DAUBERT AND *FRYE* MODELS: IMPLICATIONS FOR ADMISSIBILITY OF EXPERT TESTIMONY FOR NIGERIA*

Abstract

In spite of the fact that there are many indices to consider when determining who an expert is, the ultimate question is whether the expert's testimony will be admissible in court. The governing standards of expert witness admissibility are not uniform throughout the world. The two major governing standards can be found in two United States seminal cases, a D.C. Circuit case, Frye v United States[1] *and a U.S. Supreme Court decision,* Daubert v Merrell Dow Pharmaceuticals, Inc.[2] . *The federal court system exclusively follows* Daubert *while state courts are divided between the two. Interestingly, each state has taken on its own interpretation of these two benchmark cases, making the admissibility of expert testimony more variable between jurisdictions. Prior to trial – and ideally, prior to retaining your expert – it is critical to have a working understanding of these standards, their specific jurisdictional variations, and any recent, applicable case law. This study considers these options and sees in each element that can be adopted in Nigeria for more effective delivery of justice.*

Keywords: *Daubert, Frye, Admissibility, Expert testimony, US, Nigeria*

1. Introduction

The standards for determining the admissibility of testimony have always been issues for the courts. Until the middle of this century it was rare for the British courts to hear testimony on mental issues from experts who were not medical doctors[3]. The qualification an expert is expected to have varied from one legal system to another. In the United Kingdom (UK), the 1993 Royal Commission on Criminal Justice recommended that professional bodies assist the court by maintaining a register of members qualified to act as expert witnesses in particular fields[4]. A psychologist practising in the UK is expected to hold a chartered status which is endowed by the British Psychological Society on the basis of relevant qualifications and experience in the field in which the psychologist claims expertise. In England and Wales, as well as in Nigeria, it is good practice for expert witnesses to give an overview of their qualifications once they are sworn in. In the United States of America (USA), there are no uniformly adopted standards by which courts operate but there are requirements that have to be met in order for expert testimony to be admissible. The best known criteria on which expert testimony has been judged in the USA are Frye and Daubert. This study evaluates these models and makes some recommendations.

2. Frye Test

Since 1923 in the US, research on eye witness memory has been subject to the Frye test, a legal criterion that scientific testimony is admissible only if it is based on a theory and evidence that is sufficiently established to have gained acceptance in a particular field in which it belongs[5]. The judge relies on a consensus as to the status of the evidence from the relevant scientists, for example that work upon which the expert evidence is based has been documented in a scholarly journal, or conference presentation. This approach is limited in several ways. Once an expert's research is deemed credible there may be no further scrutiny of the scientific status of the evidence undertaken by the courts. This problem is well illustrated by O'Connor *et al* [6]: 'Once a court deems a particular type of expert testimony as generally accepted it facilitates the introduction of that type of evidence in other courts and may create a cottage industry of experts who can be called into service'. Another problem with Frye test is that it is not clear how the courts should assess mental health testimony

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[1] 293 F. 1013 (D.C. Cir. 1923)

[2] 509 U.S. 579 (1993)

[3] M O'Connor *el at* ***Law*** *Mental Health and Mental Disorder.* (New York: Brooks Cole Publishing company).

[4] Frecthelton & H. Selby. *Expert Evidence: Law Practice, Producers and Advocacy* (3rd edu) [Prymount, New South Wales, Austria : Law Book Co]2005

[5] 293. F 1013 (1923)

[6] *Ibid,* p. 80

based upon clinical opinion. Clinical expert testimony (assessment of mental competence) is not routinely subject to the Frye test; so it seems that there are different standard for evidence based upon clinical judgment and experience versus evidence based upon empirical research. In other words, the courts are applying one set of criteria to clinical expertise and another to scientific expertise. This has become an important issue for debate as the number of cases that draw upon evidence for recovered memory increases.

3. Daubert Ruling

A U.S Supreme Court decision taken in 1993 in *Daubert v Merril Daw Pharmaceuticals*[7] addressed the standards that Federal courts use for the admission of scientific evidence. The Daubert case debated the testimony of experts on whether or not the anti-nausea drugs Bendectin was responsible for birth defects. Daubert said Frye was not the test of expertise and gave trial judges the task of making preliminary assessment of the scientific validity of expert evidence. Daubert listed four factors which are deemed necessary in testing the validity of expert evidence. These are falsifiability, error rate, peer review and general acceptance. The first is based on proper criterion for distinguishing scientific from non-scientific evidence, the principle of refutability or testability. The second factor is the known or potential error rate of the expert's opinion[8] interpretes this as a concern about the accuracy of the diagnosis given by the experts. He gives the following as an example: what proportion of rape victims are not likely to fit the category of 'rape trauma syndrome'? a third factor is checking the credibility of an experts knowledge by looking for evidence of peer review/publication in a scholarly journal. Of course, a number of factors other than the quality of the article may determine what gets published in a mainstream journal[9]. The fourth criteria are general acceptance: this is the standard used under the Frye test but suffers the same problems as peer review and publication, it depends on the standards. However, unlike the Frye test general acceptance is no longer in itself a sufficient criterion for admission. Under Daubert what is most is scientific rigor. To quote Faigman[10], under Daubert judges must ask 'where are the data'?. While it is clear that greater attention is drawn to the science that the scientist proclaims to practice, the scope of Daubert remains unclear, for instance in dealing with the range of mental health testimony some of which is based on clinical judgments. Daubert places a lot more weight on the shoulders of the trial judge who will have to undertake the task of determining whether a new scientific theory/procedure is valid.

4. The Nigerian Case

In Nigeria, the court determines cases in favour and against based on expert evidence but the court is not bound by expert evidence. In *Fayemi v Adeayo Oni & Anor*[11,] the court held that:

> The evidence of an expert is generally an aspect of the entire evidence to be evaluated by a court because a trial court must be fully in control of all the evidence before it and must not abdicate its primary duty of assessing the evidence and forming its clear opinion in relation thereto, including any expert evidence. In other words, a court is not bound by the evidence of an expert witness, it has an opinion in the matter, that it must exercise judicially and judiciously.

In many cases, the existence of other credible evidence would constitute a good reason for rejecting an expert evidence. According to the court in the above case:

> The existence of other relevant and credible evidence before the court showing that the evidence of the expert is not and cannot be true will constitute a good reason for rejecting it. A trial judge would be right to prefer credible evidence of a non-expert witness on an issue to the evidence of an expert on the same issue where the former is an independent witness whilst that of latter prepared his evidence specifically for the case on hand on the direction of the party calling him[12]

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[7] *Daubert v Merril Daw Pharmaceuticals* 113 S Ct. 2786 (1993)

[8] D L Faigman, 'The Evidence Status of Social Science under Daubert: is it scientific, technical or other knowledge' (1995) 1 (4) *Psychology, Public Policy and law,* 960-979.

[9] D Peters & S Cecil, 'Peer Review practice of psychological journals: the fate of published articles, submitted again' (1982) 5 *Behavioural and Brain Sciences,* 187-255.

[10] *Supra.*

[11] *Fayemi v Adeayo Oni & An* (2009) LPELR-CA/IL/EP/GOV/25/2008.

[12] *Egbujuo v State* (2016) LPELR – 40938 CA

The Nigeria courts are often wary in admitting the opinion of experts especially when such experts are not called by the court. In *Fayemi v. Oni*[13], the court held thus on the admission of expert opinion:

> The lower tribunal was not in error in applying the case of *UTB v. Awanzigana Enterprises Ltd*[14] to Jettison all the opinions of the experts because they lack probative and /or evidential value. This is because when the Court of Appeal in *ANPP V. USMAN*[15] was faced with a similar dilemma on the evidence of experts, Aboki JCA held as follows: "the court must be very wary of admitting a report prepared by an expert, not at the instance of the court but at the behest of one of the parties to the disputes. Such a report should be taken with a pinch of salt.**[16]**

It is worrisome that Nigerian courts have not placed much weight on expert witnesses based on psychological and other social science and scientific research in most judgments of the courts, although the court has specifically stated when it is necessary to call expert witness. In the case of *Egesimba v Onuzurike*[17], the court per Niki Tobi JCA as he then was stated thus: 'An expert witness is only necessary if by the nature of the evidence, scientific or other technical information, which is outside the experience and daily common knowledge of the trial judge is required'.

Despite this postulation, the criterion for accepting such expert evidence on the basis of *Frye and Daubert* is not set by the Nigerian courts as is applicable in the decision of the American Courts in Frye and Daurert test (case). Emphasis is laid on expert witness in Nigerian on knowledge, skills and experience of the expert as evaluated by the court and lies heavily on the individual judges acceptance or belief on the experts testimony without laying down any grounds, criteria or baseline for admitting such evidence as in Frye and Daubert *Generally*, the Nigerian courts places emphasis in the determination of expert testimony on the provisions of the law. In M*uhammed & Anor v Aduda & Ors*[18], the court laid the principle thus:

> Under Section 57 (1) of Evidence Act, the Tribunal is vested with the power to accept as relevant the opinion of persons especially skilled in the subject matter under consideration. The criteria upon which such a person may be accepted as expert and his evidence accepted are laid down as follows:
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> 1. He must state his qualifications
> 2. He must satisfy the court that he is an expert in the subject, which he is to give his opinion
> 3. He must state clearly the reasons for his opinion

These criteria are conjunctive and when any expert witness does not meet any of these, the court is at liberty to refuse or accept his evidence as where the expert is suspected to be biased or the court finds the expert to have failed to furnish it with the necessary scientific criteria for testing the accuracy of his conclusion, or it is contradictory or inconsistent with normal conduct or is useless and not admissible in law.

The Supreme Court stated this principle in the case of *Sowemimo v State*[19], when it held thus: 'In *Wambai v Kano Native Authority*[20] it was held that in certain cases, evidence of opinion of an expert is relevant, but he must be called as a witness and must state his qualifications and satisfy the court that he is an expert on the subject in which he is to give his opinion' Evidently, the evaluation of the reasons given by the expert by the court is not based on such criteria set out in Frye and Daubert case but on the belief, conviction and appreciation of his opinion by the court.

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[13] *Supra.*
[14] *UTB v*. Awanzigana Enterprises Ltd [1994] 6 NWLR (pt. 348) 56 at 77.
[15] *ANPP v. USMAN* [2008] 12 WLR (pt. 1100) page 1 at 73.
[16] [1997] 3 NWLR (pt 496) at 689.
[17] *Egesimba v Onuzurike* [2002] 15 NWLR (pt 791).
[18] M*uhammed & Anor v Aduda & Ors* [2009]LPELR /EP-CA/A/EP/03/2008.
[19] *Sowemimo v State* (2004) 18 NSCQR 24 pp 1965.
[20] *Wambai v Kano Native Authority* (1965) NWLR 15.

In plethora of cases decided by the Nigerian courts on the admissibility of expert testimony and the weight the court will attach to such evidence, the attitude of the court is for the judge to decide and accept that the witness is an expert witness as provided by Section 57(1) of the Evidence Act and consequently if it does, to treat such evidence with the respect and candour. In *Amosun v INEC & Ors*[21] the court referring to the cases of *Ude v. Osuji* [22]*;* NICON v Nze[23], *Amu v. Amu*[24] held that:

> … once the court comes to the conclusion that a witness called to or subject on which it has to form an opinion, is an expert for being specially skilled thereon as envisaged by the provisions of Section 57(1) of the evidence Act, the law requires it to treat such evidence with respect and candour.

In *Ogiale v Shell Pet. Dev. Co. Nig Plc*[25], the court stated that:

> The opinion evidence by an expert is not, by any means, conclusive of the point on which he testifies because only and only because the opinion is that of an expert. No. All am trying to say is this; a judge in a non-jury trial, or the jury, in a jury trial does not just surrender his independent judgment on an issue to the expert witness because he is an expert. If there be good causes or a good cause, the judge or the jury may, well, legitimately reject the opinion evidence of the expert.

The conclusion of this and other decisions of the court in Nigerian court practice on expert testimony is that the judge is the final person that will decide whether to accept or reject expert testimony based on his own personal assessment and criteria as against the practice in the USA, /England and other jurisdictions, but the difference as seen in FRYE AND DUABERT is that there are guideline set by the court in determining whether there is a good reason or whether there is a good cause or causes based on psychological, social and scientific research on the testimony of the expert.

5. Adversarial versus Inquisitorial Systems in Expert Testimony

According to Damasha[26] it was a deep routed distrust of judges in the United Kingdom (UK) and USA that led to the adversarial system. The latter minimized the role of judges and placed the case in the hands of interested parties. In continental Europe judges have a key role to play. They are the major channel for information and play an active part in the preparation and evaluation of evidence and in the questioning of witnesses. For instance, in Germany and France, the courts routinely appoint experts. The defendant in the trial is questioned largely by the judge while the advocate's role is to object to questions and seek supplementary information[27]. In the inquisitorial system, the psychologist could be appointed as an amicus curia or friend of the court to appear in an educational role. Experts have more freedom in the inquisitorial system in how they present their evidence and they are encouraged to re-enact scenarios where possible in order to resolves conflict. Evidence may be presented in the form of a brief which provides a summary of relevant literature and conclusions which can give juries a balanced over view of the research. In USA and Nigeria, court appointed experts are infrequently employed. This seems to be because of the perceived difficulty in accommodating experts in a system that is used to adversarial presentations of evidence[28]. The survey showed that court-appointed experts were most often used to getting information on technical issues. For example, in personal injury cases, medical experts would be called to assess the nature of the injury and offer a prognosis. This enables jurors to reach a decision from a more informed perspective.

In the UK, the majority of psychologists who have been called in eyewitness testimony cases have played an advisory role only with their activities being limited to consultation with an attorney usually the defence and

[21] *Amosun v INEC & Ors* [1990] 5 NWLR (pt. 151) 488 at 573.
[22] *Ude v. Osuji* [2004] 15 NWLR) pt. 896) 245 at 264.
[23] NICON v Nze [2000] 7 NWLR (pt. 663) 164, 167.
[24] *Amu v. Amu* [2010] LPELR-CA-1/EPT/GOV/01/2009.
[25] *Ogiale v Shell Pet. Dev. Co. Nig Plc* [1997] INWLR (pt. 480) 148 at 183(c) (-d) per Nsofor JCA
[26] M Damasha, 'Evidentiary barriers to correction and two models of criminal procedure: a comparative Study' (1973) University *of Penn Sylvania law Review*, 506.
[27] J Mc Ewan, *Adversarial and inquisitory proceedings* in R. Bull & D. Carson, D (Eds) *Handbook of Psychology in legal context* (Chichester: John Wiley & Sons. 1995).
[28] J S Cecil & TE Willging, 'Court appointed experts: defining the role of evidence 706' *Federal Judicial Centre Court appointed experts*, 1993.

report writing. Clinical psychologists in the UK usually work across a wide variety of areas of mental health and also work with individual clients in clinical settings drawing on their clinical expertise as well as scientific knowledge[29]. Clinical psychologists in the UK are used as expert witness primarily in civil cases for example, in connection with the mental state/capabilities of the client or in child custody disputes. In criminal cases, clinical psychologists can be concerned with questions concerning the sanity, competency and potential danger of the defendant.

In the Netherlands, the opinions of expert witnesses are taken at face value by the courts. Experts are court appointed and are courts witnesses. As such they are expected to be neutral. Also most expert witnesses are drawn from a relatively small pool[30]. In France, the system is again different, the judge controls the experts investigation or monitors the whole process. As soon as the judge considers it appropriate, he or she orders an investigation by an expert and monitors the experts work.

6. Impact of Expert Testimony

One of the central concerns that arise regarding the use of expert testimony in the court room is whether or not it poses a danger to the judge or jury. Penrod et al,[31] suggest that there are four grounds on which expert testimony on eyewitness issues may be rejected by the courts. First there is the scientific basis of the testimony on eyewitness issues namely the lack of explanatory theory, unreliability of research findings and the limited application of laboratory data to the real world. Penrod et al predict that experimental psychologists will be increasingly asked to talk about the role of basic scientific concepts and practices in eyewitness research. As a result of *Daubert*, judges will be in a position to learn more about the principles governing scientific acceptability of research findings. A second basis for rejecting eyewitness evidence concerns its perceived helpfulness to the judge or jury. One of the central questions here is whether or not eyewitness research invades the province of the court: is it a matter of common sense? Does it have a prejudicial effect? A third basis for excluding eyewitness expert testimony is that safeguards such as the cross-examination of witnesses or judges instruction may not adequately address the issues. Finally, expert witness testimony may be rejected because the role of the expert is different. Unlike expert psychiatrist, the typical expert on eye witness memory does not comment on the reliability or credibility of a witness but the likely effect of witnessing conditions. A large proportion of the debate surrounding expert testimony centers on the empirical question of what, if any, affects expert testimony has on juror/judge judgment and the decision making. One of the central questions is whether scientific research makes common sense and helps the judge or jury to reach a decision. As Penrod et al argue, these are essentially empirical questions to which there are empirical answers.

7. Expert Testimony in a Rape Trial: A Case Study

In rape cases (as in child sexual abuse cases), prosecutors have difficulty in obtaining convictions based solely on a victim's testimony. Moreover, the public hold myths and stereotypes about this type of crime that may influence the victims credibility[32]. Expert testimony may counteract these stereotypes and misconceptions. Adopting a socio-cognitive perspective, Brekke and Borgida, were interested in whether mock jurors would use group probability data in making a decision. Cognitive psychologists have noted that biases in judgment typically occur as a result of the vast amount of information that has to be processed in reaching decision. One type of bias is known as a base rate fallacy which is a tendency to use group data in preference to individuating information. Brekke and Borgida were interested in how the base rate fallacy would operate in a jury context. It was hypothesized that jurors would make the most use of group data in the form of expert testimony when presented early in trial proceedings and linked in the case at hand. Participants (jurors) were 208 undergraduates. The type of testimony was varied according to the type of expert. All versions included an opening statement from the judge, opening arguments from prosecution/defence, defendant's testimony, cross examination, closing arguments and the judge's final charges to the jury. In the standard forms, the

[29] G GudJonson, 'Psychological Evidence in court' (1996) 9 (5) *The psychologist*, 213-219.
[30] HFN Crombag, 'Expert witness as vicarious anchors' (1993) 5 *Expert Evidence,* 127-131.
[31] SD Penrods *et al,* 'Expert psychological testimony on eyewitness reliability before and after Daubert: the state of the Law and Science' (1995) 13. *Behavioural Science and the Law,* 229-259.
[32] N Brekke & E N Borgida, 'Expert psychological testimony in rape, trial: a socio-cognitive analysis'/structure' (1988) 53 *Journal of personality and social psychology* 372- 386.

expert dispensed testimony in a lecture-type format. In the hypothetical form, jurors listened to standard expert testimony followed by an explicit attempt to point out the connection between expert testimony and the case under consideration. As expected, women were more farvourably disposed towards the defendant on a variety of measures and they rendered significantly more guilty verdicts although the sex differences were less pronounced after deliberation. Women attributed less responsibility to the victim and considered it less likely that she had consented. Female jurors also rated the victim as being significantly more credible. Mock jurors exposed to the specific hypothetical expert testimony were significantly more likely to vote for conviction and to recommend harsher sentences than were jurors who received standard expert testimony.

Brekke and Borgida concluded that expert testimony on behalf of the prosecution may counteract the pervasive effect of rape myths and misconceptions on juror judgments in a stimulated trial. When such testimony was linked directly to the case by means of a hypothetical example or persecuted early in the trial, the result was a higher conviction, harsher sentences and more farvourable perceptions of the victim. These findings were obtained despite the fact that jurors did not rate expert testimony as being useful in reaching verdicts. Thus it is possible that when expert testimony is linked with details of the case, it may be useful in reaching verdicts. Timing also seems to be important, most use is made when testimony appears early in trial. This suggests jurors approach the case with an impression set rather than a recall set i.e rather than store case facts one by one, jurors may try and organize information into a consistent meaningful while. Expert testimony presented early may serve as a powerful organizing theme for juror's first impression of a case.

8. Conclusion

In most trials in Nigeria, persons are called as witness to prove a particular set of facts in a case. These set of persons are called experts meaning that they are either skilled or knowledgeable at what they do. An expert is someone who has a prolonged or intense experience through practice and education in a particular field. Informally, an expert is someone widely recognized as a reliable source of technique or skill whose faculty for judging or deciding rightly, justly, or wisely is accorded authority and status by peers or the public in a specific well-distinguished domain. An expert, more generally, is a person with extensive knowledge or ability based on research, experience, or occupation and in a particular area of study. He is a person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder. *Experts* are *admissible* as *witness* but they are not to make conclusion, as it is a judicial function. He must prove himself as an *expert* before the Court. Some training must have been practiced by *expert* into that scientific field or has special knowledge of that field. The study carried out is a consideration of the fundamental models that shape admissibility of expert testimony. This paper is in favour of developing a *tertium quid* between the models and recommends the result for Nigerian justice system.