Analysis (/analysis/)

The Fallibility of Expertise: A Call for Judicial Skepticism

In his Matrimonial Practice column, Timothy M. Tippins uses the so-called "expertise" that we've seen almost daily durin the pandemic to illustrate the point that expert utterances need to be assessed with a massive measure of skepticism. Specifically, forensic testimony in custody trials is one that is truly ripe for intense and skeptical judicial scrutiny.

By **Timothy M. Tippins** | February 05, 2021 at 12:30 PM

Timothy M. Tippins

If ever we needed a lesson in the fallibility of expertise, the past year has rendered it in spades. As Americans struggled to cope with the COVID-19 pandemic, the public performance of the "experts"—the ones prancing to the podium, not the ones working quietly in their labs to develop life-saving vaccines—have ranged from inconsistent to disingenuous, with a healthy dose of hubris thrown in for good measure. For those disposed to defer to authority, it has been a sobering slog. Yet within the morass of misinformation reposes an important message for lawyers and judges who are called upon to assess the reliability of expertise in the courtroom: Expert utterances need to be assessed with a massive measure of skepticism.

Parade of Peccadilloes

Let's briefly recall just a few of the Greatest Hits of the past year. First, we were told, "Don't wear masks!" Soon after, that became, "You must wear masks!" Panetta, G., "Fauci Says He Doesn't Regret Telling Americans Not to Wear Masks at the Beginning

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of the Pandemic," *Business Insider,* July 20, 2020. The experts projected American fatalities would be in the millions. Then the forecast was reduced to hundreds of thousands. It was then again reduced to 60,000. Czachor, E., "Dr. Fauci Says U.S. Coronavirus Deaths Could Be Far Less Than Predicted, But Cautions Against Loosening Social Distancing Restrictions," *Newsweek*, April 9, 2020. Presently, the count is somewhat north of 400,000.

Then there was the egregious decision to place virus-positive patients in nursing homes where the most vulnerable among us lived and, as even a 12-year-old could have predicted, died—in droves. The exact number of deaths resulting from this fiasco was a closely guarded state-secret until New York's wunderkind Health Commissioner was forced by the Attorney General's report to acknowledge that more than 12,000 nursing home residents perished. Tarinelli, R., "**NYS Health Department 'Vastly Undercounted' Virus Nursing Home Deaths, State AG Report Finds (https://www.law.com/newyorklawjournal/2021/01/28/nys-health-department-vastly-undercounted-virus-nursing-home-deaths-state-ag-report-finds/)**," NYLJ, Jan. 28, 2021; Hogan, B., Golding, B., "NY Nursing Home COVID Deaths More Than 12K, Cuomo Health Chief Reveals," New York Post, Jan. 29, 2021; Condon, B., Sedensky, M., Hoyer, M., "New York's True Nursing Home Death Toll Cloaked in Secrecy," AP News, Aug. 11, 2020.

Recently, Dr. Anthony Fauci, the most glittering star in the illuminati's constellation, changed his estimate of the percentage of the population that would require vaccination to achieve "herd immunity" (a metric that is a function of the virus itself, not the willingness of the population to be vaccinated). For months it was said that 60% to 70% would do the trick. Now, Fauci has moved the goalpost to 80% to 85%. Why? Public opinion polls! Fauci evidently has long held the view that these higher numbers were the more accurate but told the New York Times that he had previously hesitated to publicly raise his estimate because many Americans seemed hesitant about vaccines.

> "When polls said only about half of all Americans would take a vaccine, I was saying herd immunity would take 70 to 75 percent," Dr. Fauci said. "Then, when newer surveys said 60 percent or more would take it, I thought, 'I can nudge this up a bit,' so I went to 80, 85."

McNeil, D.G., "How Much Herd Immunity is Enough?," New York Times, Dec. 24, 2020.

Rather astonishingly, Fauci added, "We need to have some humility here." Really? It might strike some that deliberately misleading the American people whose tax dollars have enabled him to nurture at the public mammary for more than half a century is quite the opposite of humility.

This is but a sampling of the professional peccadillos that have marked the floundering and duplicitous proclamations of the highly credentialed, self-sanctified savants who preened daily before the cameras. If the subject were not so grave, it would be downright comical. Comedy aside, however, within this mountain of muck, a question lurks that is specifically pertinent for jurists and litigators: If the flood of fiascos emanating from experts at the public podium is a measure of their reliability, are their opinions any more reliable when they are uttered from the witness stand?

Enter the Court of Appeals: 'People v. Williams'

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Fortuitously, at about the same time as the above-referenced torrent of failures began, the Court of Appeals delivered a decision that wisely underscored the need for judicial scrutiny and skepticism when assessing the admissibility of expert testimony. *People v. Williams*, 35 N.Y.3d 24 (2020) dealt with the admissibility of DNA evidence in a homicide prosecution. Defendant requested a *Frye* hearing (*Frye v. United States*, 293 F. 1013 (1923)) with respect to the reliability of the underlying methodologies that generated the conclusions being offered against him. The trial court denied the hearing and received the contested proof. The defendant was convicted of manslaughter. The Court of Appeals found the denial of the *Frye* hearing to be an abuse of discretion as a matter of law.

Williams opened its analysis exquisitely by quoting the American physicist, Richard P. Feynman's marvelous statement that "Science is the organized skepticism in the reliability of expert opinion," words that should be emblazoned in bronze on the wall of every courtroom in the land. It then proceeded to assess the admissibility question under *Frye* and set forth a number of significant points.

Unlike the federal courts and a majority of states that have embraced the more versatile and rigorous *Daubert* approach to expert evidence (*Daubert v. Merrill Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993)), New York clings to the century-old *Frye* test. *Frye* held that for expert opinion testimony to be admissible the underlying principles and methods upon which the opinion is based must be generally accepted as reliable within its specified field or, in more current parlance, in the relevant scientific community. Citing to *People v. Wesley*, 83 N.Y.2d 417 (1994), New York's seminal DNA decision, *Williams* noted that the proponent of expert testimony bears the burden of proving general acceptance, a burden that requires a showing that there is "consensus in the scientific community as to the methodology's reliability." As the concurring opinion in *Wesley* observed:

> The point of noting controversy about the reliability of the forensic technique is not for our Court to determine whether the method was or was not reliable —, but *whether there was consensus in the scientific community as to its reliability*. The Frye test emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion." Where controversy rages, a court may conclude that no consensus has been reached.

Wesley, 83 N.Y.2d at 464 (emphasis added).

In effect, under *Frye*, general acceptance is "a surrogate for determining the reliability of the purported scientific methodology." *Williams*, 35 N.Y.3d at 37.

In determining whether there is general acceptance the court can consider an array of materials, including "texts, laboratory standards, and articles issued with respect to the technique in question," as well as judicial precedent and expert testimony. With respect to reliance on judicial precedent, however, *Williams* wisely cautioned that the fact that a prior decision found general acceptance is not conclusive: "The repetition of a single, questionable judicial determination does not strengthen or add validity to such ruling, and it defies logic that an error, because it is oft-repeated, somehow is made right." Id. at 39.

Nor does long acceptance by the courts mean that a particular methodology is beyond reconsideration. The court observed:

> We have said that a Frye hearing is generally unwarranted "[a]bsent a novel or experimental scientific theory." That teaching, of course, leaves room for such a hearing even where the scientific principle in question is neither novel nor experimental. The recoil with respect to previously accepted techniques demonstrates the importance of the space accorded trial courts to conduct a Frye hearing even with respect to a scientific approach that may have become common over time.

Id. at 43. The court noted:

> Familiarity does not always breed accuracy, and our Frye jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a Frye hearing with respect to a familiar technique. There is no absolute rule as to when a Frye hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations.

Id. at 43. Supporting this point, the court set forth numerous examples of principles and methodologies that may have become common practice but that are of dubious reliability:

> Indeed, admissibility even after a finding of general acceptance through a Frye hearing is not always automatic. Recent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question.

Id. at 43.

The Custody Context

The *Williams* decision carries several instructive points relevant to the family law practitioner facing adverse expert testimony, both generally and in the context of forensic mental health opinions in custody disputes.

First, as is the case in assessing the admissibility of all expert evidence, courts must ensure that "the highest standards of reliability are maintained" when confronting proffered forensic mental health opinions. This paramount objective, *ensuring reliability,* was pointedly reinforced throughout the opinion, referencing the "exacting standards to be applied in courts of this state."

Second, though forensic custody evaluations are not novel, there is hardly a robust body of *Frye* jurisprudence in New York wherein evaluation methodologies have been closely scrutinized and found to meet the standard of evidentiary reliability. As *Williams* reminded us, familiarity does not shield the expert from intense evidentiary scrutiny.

Third, as *Williams* made clear, a *Frye* court can consider an array of materials reflecting the status of a particular methodology in the relevant scientific community. There is a rich professional literature that can be cited in support of a *Frye* challenge to forensic testimony in contested custody cases, particularly when

the evaluator recommends a specific parenting plan or best interest determination. Tippins, T. M., & Wittmann, J. P., "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance," 43 Family Court Review 193-222, Association of Family and Conciliation Courts (April 2005); Martindale, D. A., Tippins, T. M., Ben-Porath, Y. S., Wittmann, J. P., & Austin, W. G. (2012), "Assessment Instrument Selection Should Be Guided by Validity Analysis Not Professional Plebiscite: Response to a Flawed Survey, Family Court Review," 50(3), 502-07; Grisso, T., "Commentary on 'Empirical and Ethical Problems With Custody Recommendations': What Now?," 43 Family Court Review 223-28, Association of Family and Conciliation Courts (April 2005); O'Donohue, W., & Bradley, A. R., "Conceptual and Empirical Issues in Child Custody Evaluations," Clinical Psychology: Science and Practice, 6(3), 310-22 (1999).) Indeed, the American Psychological Association's *Guidelines for Child Custody Evaluations* explicitly acknowledge: "[T]he profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (i.e., "ultimate opinion" testimony)." Guidelines for Child Custody Evaluations in Family Law Proceedings, Section 13, December 2010; *American Psychologist*, 863, American Psychological Association, Vol. 65, No. 9, 863-67.

Juxtaposing the above acknowledgement of controversy by the psychology profession's trade union with the consensus requirement underscored by *Wesley* and *Williams* should provide a compelling core to a *Frye* application made to preclude such opinions.

Conclusion

Americans have been conditioned to look to experts for answers to all manner of questions. Yet, all that glitters is not gold and not all that bloviates is legitimate expertise. As *Williams* made clear, there is no dearth of specious "expert" techniques that have been slithering into our courtrooms for decades. Forensic testimony in custody trials is one that is truly ripe for intense and skeptical judicial scrutiny.

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