EXPERT WITNESSES

***N.Y. Court's Evidence Website*:**

https://www.nycourts.gov/judges/evidence/index.shtml

Generally When Appropriate

De Long v. County of Erie, 60 N.Y.2d 296, 307 (N.Y. Court of Appeals 1983)

People v Taylor, 75 NY2d 277, 282 (N.Y. Court of Appeals 1990)

Expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror."

Matott v. Ward, 48 N.Y.2d 455, 450 (N.Y. 1979)* was cited to in Nicole V.

"A predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of facts." Which case is this?

"The expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable."

Court of Appeals has said that the "cause and effect relationship is one that "perhaps by its very nature" cannot "be established with scientific certainty" and therefore, that opinion evidence as to causation must merely state "a probability supported by some rational basis"

Vasaturo v Vasaturo, 224 AD3d 1193, 1194 (3rd Dept 2024)

Ultimately, "[t]he admissibility and scope of expert testimony is addressed to the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion or an error of law"

Causation, Opinions, Causation

Knoll v Third Ave. R. R. Co., 46 App Div 527

extent of injuries "likely" to increase in future held admissible

Drollette v Kelly, 286 App Div 641

"could" have caused present condition sufficient

McGrath v Irving, 24 AD2d 236, 238

allowing "opinion" of what "was" cause of disease

Matter of Brown v Highways Displays 30 AD2d 892

finding "could be", "possibly was" and "probably was" adequate to establish condition as work-related]

Hypotheticals & Opinions

O'Shea v. Sarro, 106 A.D.2d 435 (2nd Dept. 1984)

Hypotheticals must be based on facts that are in evidence or fairly inferable from the evidence

Cassano v Hagstrom, 5 NY2d 643, 646 (Court of Appeals 1954)

It has generally been held that "opinion evidence must be based on facts in the record or personally known to the witness * * * He cannot reach his conclusion by assuming material facts not supported by evidence" also, **Lipsius v White**, 91 AD2d 271, 279; **Stracher v Corning Glass Works**, 39 AD2d 560, 561)

See **Matott v. Ward, 48 N.Y.2d 455, above, which cites:**

Knoll v Third Ave. R. R. Co., 46 App Div 527 (1st Dep't 1900) [extent of injuries "likely" to increase in future held admissible], **Drollette v Kelly**, 286 App Div 641 (3rd Dep't 1955) ["could" have caused present condition sufficient], **McGrath v Irving**, 24 AD2d 236, 238(3rd Dep't 1965) [allowing "opinion" of what "was" cause of disease]; **Matter of Brown v Highways Displays**, 30 AD2d 892 (3rd Dept 1968) [finding "could be", "possibly was" and "probably was" adequate to establish condition as work-related

Frye Hearings

Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 442 (Court of Appeals 2006)

The Frye test asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Frye holds that 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. It emphasizes counting scientists votes, rather than on verifying the soundness of a scientific conclusion

People v. Garcia, 39 Misc. 3d 482, 484 (Bronx County 2013)

A Frye hearing is necessary only if expert testimony involves "novel or experimental matters" (see People v Byrd, 51 AD3d 267, 274, 855 NYS2d 505 [1st Dept 2008], lv denied 10 NY3d 956, 893 NE2d 446, 863 NYS2d 140 [2008], citing Parker v Crown Equip. Corp., 39 AD3d 347, 348, 835 NYS2d 46 [1st Dept 2007]). The application of a generally accepted [***4] technique, even though its application in a specific case was unique or modified, does not require a Frye hearing (see Byrd, 51 AD3d 267, 855 NYS2d 505; Styles v General Motors Corp., 20 AD3d 338, 799 NYS2d 38 [1st Dept 2005]). The Frye test concerns only the acceptability and reliability of the scientific technique and not the "adequacy of the specific procedures used to generate the particular evidence to be admitted" (see Wesley, 83 NY2d at 422).

Davydov v Board of Mgrs. of Forestal Condominium, 185 A.D.3d 548, 550 (2nd Dep't 2020)

The question of whether specific contaminants cause physical injury does not present a novel scientific theory (see Nonnon v City of New York, 32 AD3d 91, 819 NYS2d 705 [2006], affd 9 NY3d 825, 874 NE2d 720, 842 NYS2d 756 [2007]). Therefore, the defendants are not entitled to a Frye hearing (see Frye v United States, 293 F 1013 [DC Cir 1923]).

Child Protective Cases

In re Nicole V., 71 NY2d 112 (Court of Appeals 1987)

Child's social worker provided expert testimony based on her 10 sessions with the child, about the child's behavior and this provided sufficient corroboration for the child's out of court statements.

- **An expert's relationship to the party offering her does not disqualify the witness from giving opinion evidence and any bias (the expert) may have had could be addressed on cross-examination Nicole V., at 122**
- **The court held that expert testimony about a child's behavior by the child's therapist satisfied the standards of § 1046(a)(vi) because child sexual abuse syndrome was a recognized diagnosis.**
- **The psychological and behavioral characteristics and reactions typically shared by victims of abuse in a familial setting are not generally known by the average person and the courts, Nicole V., at 120, compared to the child in question, Nicole V., at 121-122.**
- **What are the symptoms or behaviors of the subject child? Which of those behaviors are commonly seen in victims of sexual abuse?**

In re Yorimar K.-M., 309 AD2d 1148, 1148 (4th Dept 2003)

Although the expert did not specifically testify that the victim had in fact been abused, she testified that the victim's behavior was consistent with that of children who had been sexually abused.

In re Elizabeth G., 255 AD2d 1010, 1011 (4th Dept 1998)

What is the children's affect when describing abuse? Children became agitated, had anxiety, was uncomfortable and distracted when describing abuse, including hiding behind a chair during when describing the abuse. The social worker testified that the behavior of both children were consistent with the behavior of sexually abused children.

In re Thomas N., 229 AD2d 666, 668 (3rd Dept 1996)

The Sgroi method tests for the existence of five standards; (1) multiple incidents of the abuse over time, (2) progression of sexual activity, (3) an element of secrecy, (4) an element of pressure or coercion, and (5) the graphic detail of the events.

Matter of Lee-Ann W. (James U.), 151 AD3d 1288 (3rd Dept 2017)

Third Dep't overturns Family Court finding of sexual abuse. An expert had testified that "poorly worded questioning about sexual abuse can alter a child's responses and, indeed, his or her memories in such a way that a child sometimes reports abuse that did not occur in an effort to please the interviewer by providing what the child perceives as the answer the interviewer wishes to hear."

Matter of Destiny C. (Goliath C.), 127 AD3d 1510 (3rd Dept 2015)

Corroborative evidence included expert testimony that her disclosures and her advanced sexual knowledge were consistent with those of a child victim of sexual abuse. In addition, Family Court was presented with an expert opinion that the scarring inside of the older girl's vagina and the size of the opening of her rectum were both consistent with those findings expected for a child who had been

sexually abused. Also, with regard to a "deprivation of effective assistance of counsel" allegation, the respondent did not identify relevant experts who would have been willing to testify in a manner helpful to either of their cases. Further, neither the father nor the mother specifically alleges that his or her respective counsel failed to investigate whether such expert witnesses existed.

People v. Spicola 16 N.Y. 3d 441 (Court of Appeals 2011)

"We have "long held" evidence of psychological syndromes affecting certain crime victims to be admissible for the purpose of explaining behavior that might be puzzling to a jury (see Carroll, 95 NY2d at 387). Indeed, the majority of states "permit expert testimony to explain delayed reporting, recantation, and inconsistency," as well as "to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following sexual assault, why a child might run away from home, and for other purposes"

In re Lonell J., 242 AD2d 58 (1st Dept 1998)

Nothing in section 1012 itself requires expert testimony, as opposed to other convincing evidence of neglect. Family Court Act § 1046 (a) (viii) states that "proof of the 'impairment of emotional health' or 'impairment of mental or emotional condition' as a result of the unwillingness or inability of the respondent to exercise a minimum degree of care toward a child *may* include competent opinion or expert testimony"

Such inclusive language undermines any conclusion that expert testimony is required.

State of New Jersey v. Nieves, 476 NJ Super 609

"The evidence supports the finding that there is a real dispute in the larger medical and scientific community about the validity of shaking only SBS/AHT theory, despite its seeming acceptance in the pediatric medical community."

" In determining whether ABT/SBS is generally accepted within the medical and scientific community requires evaluation of two considerations: (1) whether the theory is generally accepted by the biomechanical community and supported by biomechanical testing and (2) whether the theory is generally accepted by the pediatric medical community and supported by clinical data connecting the constellation of symptoms with SBS/AHT."

CHILD WITNESSES

People v. Parks, 41 N.Y.2d 36 (Court of Appeals 1976)

The court can request and allow proffered testimony from another, competent individual, regarding the competence of a potential witness to testify. See.

People v. King, 137 Misc.2d 1087, 1089 (N.Y. County 1988)**, (citing to People v. Nisoff,** 36 N.Y.2d 560, 566 **(1975), citing Wheeler v. United States,** 159 U.S. 523, 524 (1895).

The question of whether to accept the sworn testimony of a child younger than the presumptive age (14) rests primarily with the trial judge, who sees the proposed witness, notices his manner, his

apparent possession or lack of intelligence. A trial judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath.

People v. Morales, 80 N.Y.2d 450 (Court of Appeals 1992**).**

The court (usually the trial judge, or, in some instances, the prosecutor/petitioner) is required to conduct a preliminary voir dire or examination of the prospective child witness, which involves a number of inquiries.

In the Matter of Christina F .,74 NY2d 532 (Court of Appeals 1989)

A child's out-of-court statements describing sexual abuse by her father may be corroborated by the child's later cross-examined but unsworn in-court testimony, so as to support a fact finding of abuse. The corroborative evidence offered here was testimony in court, before a Judge and court reporter, with direct examination, cross-examination by respondent's attorney, and additional questioning by both the court and the Attorney for the Child.

In re Roy T., 126 Misc.2d 172, 173 (Monroe County, 1984)

A four-year-old child abuse victim was permitted to provide unsworn testimony after a preliminary examination by the court to establish whether or not he "understood the nature of an oath, the difference between right and wrong, the duty to tell the truth, and whether any punishment follows the telling of an untruth."

In the Matter of Aryeh-Levi K, 134 A.D.2d 428 (2nd Dep't 1987).

After the court conducted an in-camera interview with the appellant's five-year-old stepdaughter, it concluded that she was competent to testify, although she was incapable of being sworn. Her unsworn testimony detailing her stepfather's acts of sexual abuse against her was properly deemed credible. Such unsworn testimony alone could have been sufficient to support a prima facie case of sexual abuse

Matter of Destiny P., 48 Misc.3d 435 (Kings Cty. 2015)

statements by a non-subject child are inadmissible hearsay unless the respondent could have been a PLR for that child.

Matter of Ian H., 42 A.D.3d 701 (3d Dept 2007)

"The admissibility of a child's prior out-of-court statement regarding abuse or neglect is not limited to such statements that are attributable only to children who are the subject of the proceeding."

See also Matter of Cory S., 70 A.D.3d 1321(4th Dept 2010)

Testimony outside respondents presence

Matter of Q.-L. H. v C.-M. W., 27 AD3d 738, 739 (2nd Dept 2006)

The Family Court must balance the due process rights of an article 10 respondent with the mental and emotional well being of the child. The Family Court properly balanced the respective interests of the parties and, based upon the record, reasonably concluded that the child Y.-L. R. would suffer emotional trauma if compelled to testify in front of the appellant

Dep't of Soc. Servs. v. Phillip C., 1991 N.Y. Misc. LEXIS 838 at 1 (N.Y. Fam. Ct. 1991)

No 'presumptive right' to elicit a child's testimony before the trial judge outside the respondent's presence and that no 'presumption of harm' to the child who testifies in front of a respondent may be drawn from the fact that the child is an alleged victim of sexual abuse

The determination of harm to a child must be made by the trial court on a case-by-case basis

When considering the potential harm to the child, "[t]ender years, mental health, behavior in the courtroom, the need to shield some children from the emotional trauma certain disclosures would be likely to produce, … are not the kind of considerations which Family Court Judges must or should ignore."