

---

2000 - 2002 REPORT OF THE  
SUPREME COURT COMMITTEE ON  
THE RULES OF EVIDENCE



---

February 8, 2002

TABLE OF CONTENTS

I. RULE AMENDMENTS CONSIDERED AND REJECTED . . . . . 1

Proposed Amendments to N.J.R.E. 702

- Testimony by Experts . . . . . 1

II. OTHER RECOMMENDATIONS . . . . . 4

Reconsideration of the Committee's Recommendation to  
Abolish the Fresh Complaint Doctrine . . . . . 4

III. MATTERS HELD FOR CONSIDERATION . . . . . 6

Proposed Amendment to Article V Privileges

- Parent/Child Privilege . . . . . 6

IV. CONCLUSION . . . . . 7



I. RULE AMENDMENTS CONSIDERED AND REJECTED

Proposed Amendments to N.J.R.E. 702 - Testimony by Experts

The Supreme Court Committee on the Rules of Evidence ("the Committee") considered whether it should amend N.J.R.E. 702, which governs the admissibility of expert testimony, to reflect the federal Daubert standard (Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993)). The Supreme Court in Daubert set forth a non-exclusive checklist for trial courts to use in assessing the admissibility of scientific expert testimony. Id. at 593-94, 113 S. Ct. at 2795, 125 L. Ed. 2d at 482-83. The factors the Supreme Court listed as relevant to the inquiry are: 1) whether the expert's technique can be tested through the scientific method; 2) whether the technique was subject to peer review and publication; 3) the known or potential rate of error of the technique; 4) the existence and maintenance of standards controlling the technique's operation; and 5) whether the technique had gained general acceptance in the relevant scientific community. Ibid.

In a subsequent opinion, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 146, 119 S.Ct. 1167, 1173, 143 L. Ed. 2d 238, 250 (1999), the Court clarified that the Daubert gatekeeping function, as well as the Daubert factors, apply to all expert

testimony, not just scientific expert testimony.

Federal Rule of Evidence 702 was recently amended to conform with Daubert and Kumho.

The Committee was of the view that New Jersey's current jurisprudence on the admission of expert testimony works well and should not be altered. It believed that it would be a mistake to change our rule to conform with the federal standard before that standard is well-defined. Thus, the Committee declined to recommend a change to N.J.R.E. 702, absent direction from the Supreme Court to consider such a change.

In a related item, the Committee considered whether it should amend N.J.R.E. 702 to tighten the standards under which a witness is qualified as an expert. An expert witness must have sufficient expertise to offer the intended testimony. State v. Hackett, 166 N.J. 66, 82 (2001). Currently, N.J.R.E. 702 requires an expert to be qualified "by knowledge, skill, experience, training, or education." Admission of expert testimony is within the discretion of the trial court; nonetheless, the court's discretion to reject an expert's qualifications should be used with great caution. Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 46-48 (App. Div. 1990), mod. on other grounds, 125 N.J. 421 (1991); Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (2000). In all but

extreme instances, it is the jury's role to weigh the deficiencies in an expert's qualifications. These deficiencies can be exposed on cross-examination. State v. Frost, 242 N.J. Super. 601, 614 (App. Div.), certif. denied, 127 N.J. 321 (1990).

The Committee concluded that no change was needed to N.J.R.E. 702's provision for the qualification of experts. It noted that a party opposing expert testimony is adequately protected because the party may cross-examine the expert, before the jury, regarding any perceived weaknesses in qualifications.

## II. OTHER RECOMMENDATIONS

### Reconsideration of the Committee's Recommendation to Abolish the Fresh Complaint Doctrine

The fresh complaint doctrine is an exception to the hearsay rule that permits the State, in sexual assault cases, to introduce evidence that the victim spontaneously complained of the crime within a reasonable amount of time to someone the victim would ordinarily turn to for support. State v. Hill, 121 N.J. 150, 163 (1990); State v. Scherzer, 301 N.J. Super. 363, 419 (App. Div.), certif. denied, 151 N.J. 466 (1997). In its 1998 report to the Supreme Court, the Committee recommended abolishing the fresh complaint doctrine through amending N.J.R.E. 607 and 803(a)(2). The Supreme Court deferred action on the recommendation.

In its 2000 Report to the Supreme Court, the Committee recommended expanding the abolition of the fresh complaint doctrine to civil litigation. The Court again deferred action, asking whether "any compromise is possible and if there's any data that would support [the] notion that prosecutors are abusing the doctrine by piling on."

The Committee considered the Court's comments and, after a

full discussion, determined that the positions of the interested parties were so entrenched that the Committee could propose no compromise that would satisfy all sides. Nonetheless, after discussion, the Committee was unaware of any instances or suggestions that prosecutors were abusing the doctrine. Moreover, since the date of its original proposal to abolish the fresh complaint doctrine in 1998, the issue has been raised but not considered of sufficient importance to be discussed in any reported cases in New Jersey. State v. L.P., 338 N.J. Super. 227, 232 (App. Div.), certif. denied, 170 N.J. 205 (2001), State v. Sosinski, 331 N.J. Super. 11, 14 (App. Div.), certif. denied, 165 N.J. 603 (2000). But see, State v. D.G., 157 N.J. 112, 120-21 (1999) (holding that a witness's hearsay testimony had insufficient guarantees of trustworthiness to be admitted under the tender years exception; at trial, that hearsay testimony had been admitted under the fresh complaint doctrine).

### III. MATTERS HELD FOR CONSIDERATION

#### Proposed Amendment to Article V Privileges - Parent/Child Privilege

The Committee considered whether it should urge the Legislature to enact a parent-child testimonial privilege. After discussion, the Committee decided that the matter needed further study and carried it to the next term.

#### IV. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

Hon. Philip S. Carchman, J.A.D., Chair  
Hon. Sylvia B. Pressler, P.J.A.D., Vice-Chair  
Richard M. Altman, Esq.  
Robert E. Bonpietro, Esq.  
Hon. Theodore I. Botter, P.J.A.D. (ret.)  
Terry Paul Bottinelli, Esq.  
Hon. Warren Brody, J.A.D. (ret.)  
John M. Cannel, Esq.  
Hon. Marina Corodemus, J.S.C.  
Hon. William M. D'Annunzio, P.J.A.D. (ret.)  
Hon. William A. Dreier, P.J.A.D. (ret.)  
David Fernandez, Esq.  
Hon. Terence P. Flynn, J.S.C.  
Hugh P. Francis, Esq.  
Hon. Jane Grall, J.S.C.  
Joel M. Harris, Esq.  
Hon. Paul Innes, J.S.C.  
Cynthia M. Jacob, Esq.  
Dale E. Jones, Esq.  
Hon. Michael Patrick King, P.J.A.D.  
Brian J. Litten, Esq.  
Jeffrey J. Miller, Esq.  
Hon. Amy O'Connor, J.S.C.  
Jacqueline M. Printz, Esq.  
Professor Michael D. Risinger  
Stephen B. Rubin, Esq.  
Aletha R. Sheppard, Esq.

Hon. Edwin H. Stern, P.J.A.D.  
Carol Ann Welsch, Esq., AOC Staff