



Anthropology Section - 2015

A128 The Impact of Daubert on the Admissibility of Forensic Anthropology Expert Testimony

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After attending this presentation, attendees will understand how forensic anthropological expert testimony has been utilized in both federal and state courts as well as how such testimony has fared in admissibility determinations, both before and after the United States Supreme Court's 1993 *Daubert v. Merrell Dow Pharmaceuticals, Inc.* decision.

This presentation will impact the forensic science community by providing information on the range of topics about which forensic anthropologists are asked to testify and how this testimony is currently being evaluated by judges when the admissibility of the testimony is questioned.

During the 1970s, only a single published judicial opinion made reference to forensic anthropological expert testimony. Since then, there has been a steady and significant increase in the discussion of forensic anthropological testimony in judicial opinions, with nearly 250 references between 2000 and 2014. During this surge in testimony, expert witnesses also faced a change in the standard for the admissibility of their testimony. The 1993 Supreme Court *Daubert* decision shifted the question of admissibility from a relatively low threshold of "general acceptance" to a higher threshold requiring intensive evaluation of the expert's qualifications and the relevance and reliability of their testimony.

The goal of this study is to provide an initial analysis of judicial opinions citing forensic anthropological testimony and determine: (1) the individual identified as the forensic anthropologist; (2) whether this individual was certified by the American Board of Forensic Anthropology; (3) the areas in which this individual provided opinion evidence or testimony; (3) whether any challenges to the admissibility of the testimony were raised; and, (4) if there were any challenges, whether the testimony was admitted or excluded. A comparison of the challenges occurring before *Daubert* to those after *Daubert* provides an indication of whether *Daubert* has actually had a significant effect on forensic anthropological expert testimony. Searches were conducted using two legal databases, encompassing written judicial opinions from all federal and state courts. These databases were searched for the phrases "forensic anthropology" and "forensic anthropologist." Three hundred and thirty-three unique cases were identified and analyzed.

By topic, the most common area of testimony is trauma and/or tool mark analysis (40% of judicial references), followed by biological profile or victim identification (19%), postmortem interval (11%), and a combination of forensic recovery, decompositional processes, movement of remains, footprint analysis, and photographic comparisons accounting for the remaining testimony.

Thirty cases were identified that addressed the admissibility of forensic anthropological expert testimony, including 14 cases prior to *Daubert* and 16 after *Daubert*. Examination of these cases indicates that post-*Daubert* cases do not result in more exclusions. Prior to the *Daubert* decision, in only three cases was forensic anthropological expert testimony excluded, and only a single instance of exclusion was found among the post-*Daubert* cases. Both footprint analysis and photographic comparisons were subjected to a disproportionately higher number of challenges, given the overall low number of judicial references to such testimony.

This study found that *Daubert* does not appear to have actually impacted the outcome of admissibility determinations in the predicted manner. Although many judges cite *Daubert* and follow its framework for analysis of the admissibility of expert testimony, there is no evidence of an increasing number of exclusions of expert testimony in the forensic anthropological context.

Forensic Anthropology, Daubert, Expert Testimony