

The *Robinson/Havner/Gammill* Trilogy And the Effect on the Admissibility of Expert Testimony in Texas

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OVERVIEW

1. *Daubert's* four factors (1993)
 - a. Non-exclusive list
 - b. Test reliability of scientific evidence

2. *Daubert* comes to Texas: *Robinson's* six factors (Tex. 1995)
 - a. Application to novel science (a/k/a junk science)
 - b. Often referred to as the “Methodology Gate”

Overview Cont'd.

3. Another bite at the *Robinson* “apple” on appeal – *Havner* (Tex. 1997)
 - a. Creation of the legal sufficiency challenge
 - b. The *Havner* challenge summed up – if expert testimony is not reliable, then it constitutes “no evidence”
 - i) creates application of “opponent-friendly” standard on appeal
 - c. Ruling out other plausible causes with reasonable certainty
 - i) contrast *Weiss*, (Tex. App.—San Antonio 1999, pet. den.) with *Helena Chemical Co.* (Tex. 2001) (lack of analytical gaps)

Overview Cont'd.

4. Extension of *Robinson* to established scientific testimony and non scientific testimony – *Gammill* (1998)
 - a. *Robinson* factors not sole standard for determining admissibility
 - b. All expert testimony must be reliable
 - c. Criteria for determining reliability may vary from case to case
 - d. Creation of the “Analytical Gap Test” (a/k/a Connective Reliability)

Social or Soft Sciences

***Nenno v. State*, 970 S.W. 2d 549, 561 (Tex. Crim. App.—1998)**

- 1. Not susceptible to scientific analysis**
- 2. *Robinson* factors not appropriate**
- 3. Alternative factors:**
 - i.) the field of expertise is a legitimate one;**
 - ii.) subject matter of testimony is within scope of field; and**
 - iii.) expert properly relied upon principles in that field**
- 4. Adopted by Austin, Ft. Worth, Amarillo & El Paso courts of appeal**

Judge Brown's Eight Gates of Admissibility

1. Helpfulness
2. Qualifications
3. Relevancy
4. Methodological Reliability
5. Connective Reliability
6. Foundational Reliability
7. Bases for Testimony
8. Balancing Test

Ensuring That Your Expert's Testimony is Reliable

(The “meat” of Judge Brown's Eight Gates)

1. Foundational data must be reliable;
2. Methodology must be sound;
3. No analytical gaps; and
4. All other plausible causes must be ruled out with a reasonable degree of certainty

FOUNDATIONAL RELIABILITY

General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997)

1. Sufficient facts or data;
2. Opinion must not be contrary to undisputed facts;
3. Sources relied upon must, in fact, support the opinion;
4. Opinion must not be conclusory; and
5. Expert's assumptions must be supportive

Methodological Reliability

1. Be safe – start with application of *Robinson* factors
2. Some or all may not apply (depending on nature of testimony)
3. Non-scientific Expert Testimony – apply *Nenno* factors

Connective Reliability

1. No Leaps of Faith
2. No Analytical Gaps
3. Show close connection between facts and opinions
4. Nutshell: Credible facts/data, application (not misapplication) of reliable methodology & resulting conclusion without gaps

The Analytical Gap Test

1. non-scientific experts
2. rely upon experience & training
3. the “bee-keeper” metaphor: distinction between scientific & non-scientific expert testimony
4. reliability not properly measured by *Robinson* factors
5. notwithstanding validity of underlying data (foundation) and methodology, if there is a gap in the expert’s testimony it is unreliable
 - i.) $1+1$ does not = 3; even if Einstein says so
6. application much broader than *Robinson* factors

Level of Proof Needed to Demonstrate Reliability

1. POE
2. Burden applies equally to Plaintiff and Defendant's Experts

GOTCHA:

Volkswagen of Am., Inc., v. Ramirez, 159 S.W.3d 897 (Tex. 2004)

SBC Operations, Inc. v. Business Equation, Inc., 75 S.W.3d 462
(Tex. App.—San Antonio Dec. 19, 2001)

