

# Evidence in The Personal Injury Case

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- Has theory or technique been empirically tested?
- Has theory or technique been subjected to peer review and publication?
- Has theory or technique been determined to have a known rate of error?
- Has theory or technique developed “general acceptance”?



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Gatekeeper’s inquiry is “flexible” and true objective of the inquiry should be evidentiary relevance and reliability.



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## Conventional Devices Appropriate Safeguards

Examples:

- Vigorous cross examination
- Presentation of contrary evidence
- Careful instruction on the burden of proof
- Directed judgment and summary judgment

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## Kumho Tire

- Daubert factors apply to testimony of engineers and other experts who are not scientists.
- List of factors was meant to be helpful – not definite.
- Law grants the trial judge broad discretion.
- Trial judge must have considerable leeway.
- “Abuse of discretion standard” is applicable to review. Trial judge’s decision to admit or exclude testimony.

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## Kumho Tire

- Expert’s opinion regarding the tire failure rejected.
- Expert could not reliably determine the cause of the failure of the particular tire.
- Court had no problem with qualifications or methodology.

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### Psychologist admitted:

- Condition varies between individuals; patients vulnerable to suggestion.
- No standardized methodology to diagnose.
- Opinion based on clinical experience, research, understanding of amnesia and DSM-IV.
- No publication.
- No known error rate.
- Difficult to determine whether or not Plaintiff was lying.



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### Doe v. Archdiocese

Court concludes sufficient evidence presented to enable the trial court to find the methodology used by Plaintiff's psychologist to be reliable and relevant.



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### State v. Gray La. Supreme Ct. 1/05

Prerequisites for privilege:

1. Communication to "clergyman"
2. Purpose of communication was to seek spiritual advice or consolation
3. Communication was "private"
4. Even with 1, 2 and 3 query must be made as to "waiver"



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Benjamin v. HANO  
La. Supreme Ct. 12/04

Where circumstantial evidence is relied upon to prove negligence that evidence must exclude every other reasonable hypothesis with a fair amount of certainty.

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Scott v. Poole's  
La. Supreme Ct. 5/04

Videotape on school grounds in violation of criminal trespass statute held admissible.  
Court Notes: surveillance video aids in the "search for truth".

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Pippen v. Morehouse General  
La. Supreme Ct. 8/03

Affirms trial court's decision to allow admission of evidence regarding Defendant Physician's drug/alcohol abuse and treatment. "Very close" issue left to trial court's discretion.

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Franz v. First Bank  
La. 4th Circuit 4/04

No abuse of trial court's  
discretion in ruling video  
tapes inadmissible.



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Simms v. Progressive  
2nd Circuit 9/04

Defendant's attempted  
introduction of Plaintiff's entire  
deposition after cross  
examination and impeachment  
denied as repetitive of matters  
already on record.



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Murchison v. Lyndon Property  
3rd Circuit 12/04

Trier of fact entitled to place  
more weight on IME  
physician if that physician's  
evidence is corroborated.



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C.T. Traina v. Sunshine Plaza  
La. Supreme Ct. 1/04

Allegations by Defendant in pleadings as to "oral contract" constitutes judicial admission absent subsequent recitation that allegation was made in error.



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King v. ICR  
337 F. 3d 550 5<sup>th</sup> Cir. 2003

Plaintiff alleges spoliation.  
Court: Plaintiff must show that Defendant acted in "Bad Faith" to establish entitlement to adverse inference.



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