

Evidence Update 2021 – Prof. Bobby Harges, MAPS Monthly CLEs on Zoom.us
May 13, 2021

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Evidence Update 2021

May 13, 2021
MAPS Monthly CLE Seminars

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Overview of Presentation

- Discussion of Evidentiary rule.
- Discussion of recent case law.
- Poll Qs to test your knowledge.

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- Bobby Harges is a Professor of Law at Loyola University New Orleans. He received a B.S. degree from Mississippi State University and law degrees from the University of Mississippi School of Law and Harvard Law School. He has written several books on Louisiana evidence law, DWI law, criminal law, mediation, and arbitration.
- Mr. Harges has taught Insurance Law, Torts, Evidence, Mediation and Arbitration, Criminal Law and Procedure, and DWI Law. He is licensed to practice law in Louisiana and Mississippi and has an active mediation and arbitration practice with MAPS in Mississippi and Louisiana.
- As a neutral mediator, arbitrator, and special master with over twenty-nine (29) years of experience, he has served as a neutral in over one thousand cases.

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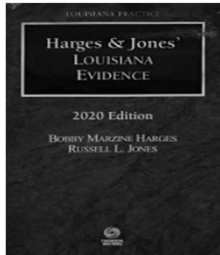
**Art. 102. - Purpose and Construction
[Fairness Rule]**

- These articles shall be construed to secure **fairness and efficiency** in administration of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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For more information ...

- For a more thorough analysis of the articles discussed today, please refer to Bobby Marzine Harges and Russell L. Jones, Harges and Jones' Louisiana Evidence (2020) Thomson Reuters/Westlaw – ISBN: 978-1-539-28264-8.



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Judicial Notice – Art. 202 [2021]

- In a summary judgment proceeding where a party alleges that the current suit is barred by the application of res judicata, in order for a trial court to rely on the decisions of other Louisiana courts in making a determination as to the applicable law, the other judgments and suit record documents must be filed in support of or in opposition to the motion in order to allow the trial court to make the appropriate factual findings in accordance with La. R.S. 13:4231.

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Judicial Notice – Art. 202

- Otherwise, a trial court commits error when it takes judicial notice of the decisions of other Louisiana courts and does not require the party to attach or provide the necessary documents in order to properly grant the defendants' motion for summary judgment. [Horrell v. Alltmont, 2020 WL 4380659, 2019-0945 (La. Ct. App. 1st Cir. 2020). (holding that trial court erred when it took judicial notice of other Louisiana decisions without requiring defendants to provide necessary documents).]

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LCE Art. 302 – Definitions

- (2) A "predicate fact" is a fact or group of facts which must be established for a party to be entitled to the benefits of a presumption.

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Judicial Notice – Art. 202

- Whitney Higginbotham Greene v. Kyle Ardoin In His Official Capacity as Secretary of State for the State of Louisiana, and Johnell Matthews, 2020 WL 5494632, (La. Ct. App. 1st Cir. 2020). (appellate court took judicial notice of the outcome of a judicial election)

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LCE Art. 305

- Art. 305. Effect of presumptions if there is no controverting evidence
- If the trier of fact finds the existence of the predicate fact, and there is no evidence controverting the fact to be inferred, the trier of fact is required to find the existence of the fact to be inferred.

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LCE Art. 302 – Definitions

- 3) A "presumption" is an inference created by legislation that the trier of fact must draw if it finds the existence of the predicate fact unless the trier of fact is persuaded by evidence of the nonexistence of the fact to be inferred.

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LCE Art. 305 – Effect of Presumptions

- Under Louisiana law, when a litigant fails to produce evidence available to him and gives no reasonable explanation for such failure, the presumption is that the evidence would have been unfavorable to his cause.
- This presumption arises when there is a duty to preserve evidence that arises from a statute, contract, special relationship between the parties or an affirmative agreement or undertaking to preserve the evidence.

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LCE Art. 305 - Effect of Presumptions

- Sayre v. PNK (Lake Charles), LLC, 188 So.3d 428 (La.App. 3 Cir. 2016).] Slip and fall. Hotel not only had entrenched across-the-board policies requiring employees to take a series of specific steps when an accident occurred, but those policies also demanded a permeating and continuing control of the evidence to the exclusion of all others. The evidence at trial further showed that the hotel selectively adhered to some of its operating procedures but failed to adhere to others

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LCE Art. 305 - Effect of Presumptions

- Further, the P did not present any evidence that the defendant was in possession of any evidence which captured the incident.
- Consequently, under the facts presented, an adverse presumption was inappropriate.

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LCE Art. 305 - Effect of Presumptions

- Hotel did not produce the evidence.
- Because the hotel offered no reasonable explanation for the its failure to produce the evidence, the court held that the presumption was that the evidence would have been unfavorable to the hotel.

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Article 411. Liability Insurance

- A. Although a policy of insurance may be admissible, the amount of coverage under the policy shall not be communicated to the jury unless the amount of coverage is a disputed issue which the jury will decide. [B,C, & D – new 2020]
- B. The existence of insurance coverage shall not be communicated to the jury unless any of the following apply:
 - (1) A factual dispute related to an issue of coverage is an issue which the jury will decide.

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LCE Art. 305 - Effect of Presumptions

- Hypolite v. Scott Partners MLT, Inc., 297 So. 3d 868 (La. Ct. App. 3rd Cir. 2020). (holding that P was not entitled to adverse presumption re video evidence)
- Another slip and fall case, adverse presumption did not apply because P did not point to any statute, contract, special relationship, or an affirmative agreement or undertaking to preserve the evidence as the defendant, a grocery store, stated that there were no such written instructions or procedures.

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Article 411. Liability Insurance

- (2) The existence of insurance coverage would be admissible to attack the credibility of a witness pursuant to Article 607.
- (3) The cause of action is brought against the insurer pursuant to R.S. 22:1973 or against the insurer alone pursuant to R.S. 22:1269(B)(1)(a) through (f).

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Article 411. Liability Insurance

- C. The identity of the insurer shall not be communicated to the jury unless the identity of the insurer would be admissible to attack the credibility of a witness pursuant to Article 607.

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Article 412. Rape Shield Statute

- here, the appellate court found that any evidence of a past consensual sexual relationship was irrelevant to the instant offense, where the accused used a weapon and accused offered no corroborating testimony of alleged past relationship);

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Article 411. Liability Insurance

- D. In all cases brought against an insurer pursuant to R.S. 22:1269 or 1973, at the opening and closing of the trial, the court shall read instructions to the jury that there is insurance coverage for the damages claimed by the plaintiff.

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Article 510. Spousal Witness Privilege

- In a criminal case or in commitment or interdiction proceedings, a witness spouse has a privilege not to testify against the other spouse. This privilege terminates upon the annulment of the marriage, legal separation, or divorce of the spouses. This privilege does not apply in a criminal case in which one spouse is charged with a crime against the person of the other spouse or a crime against the person of a child including but not limited to the violation of a preliminary or permanent injunction or protective order and violations of R.S. 14:79.

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Article 412. Rape Shield Statute

- State v. Bradley, 2020 WL 6750364 (La. Ct. App. 2nd Cir. 2020). (finding in prosecution for one count of first degree rape and four counts of second degree rape where accused used a weapon where the defense was consent that trial court did not infringe on accused sex offender's rights of confrontation when refusing to allow him to inquire into whether he and the victim engaged in prior consensual sexual acts a month earlier because the right of an accused sex offender to present a defense must be balanced against the victim's interests under art. 412;

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Article 510. Spousal Witness Privilege

- The Louisiana Supreme Court held that the spousal witness privilege does not apply in proceedings where the evidence sought relates to the abuse, neglect, or sexual abuse of a child.
- In re: Grand Jury Subpoena (Parish of West Feliciana)2020 WL 3424310 (La 2020).

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Article 510. Spousal Witness Privilege

- The wife of a man who was charged with molestation of a juvenile sought to invoke the privilege before a grand jury proceeding that was targeting her husband.
- The state argued that the Article 505 privilege was inapplicable because it only applies in a “criminal case,” and a grand jury proceeding is not yet a criminal case.

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Article 510. Spousal Witness Privilege

- La. R.S. 14:403(B) states:
- In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant.

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Article 510. Spousal Witness Privilege

- Louisiana Code of Evidence Article 1101(A)(2) which states:
- Furthermore, except as otherwise provided by legislation, Chapter 5 of this Code with respect to testimonial privileges applies to all stages of all actions, cases, and proceedings where there is power to subpoena witnesses, including administrative, juvenile, legislative, military courts-martial, grand jury, arbitration, medical review panel, and judicial proceedings, and the proceedings enumerated in Paragraphs B and C of this Article.

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Article 510. Health Care Provider-Patient Privilege

- Bridges v. Baton Rouge General Medical Center, 2020 WL 7767470 (La. Ct. App. 1st Cir. 2020).] Because the health care provider-patient privilege, under Article 510(D), may only be claimed by the patient, his legal representative, or a health-care provider or its representative asserting the privilege on behalf of the patient or deceased patient, the privilege could not be asserted by the Patient’s Compensation fund in a medical malpractice action. PCF could not keep out claimed privileged doc.

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Article 510. Spousal Witness Privilege

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Article 510. Clergy-Penitent Privilege

- State v. Faciane, 297 So. 3d 823 (La. Ct. App. 3rd Cir. 2020). (appellate court agreed with trial court in finding that communication between defendant and pastor was not made for the purpose of seeking advice or counsel).

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Article 511. Clergy-Penitent Privilege

- 1) Person must talk to a member of clergy;
- 2) purpose of the communication was to seek spiritual advice or consolation;
- 3) it must be determined that the communication was made privately and was not intended for further disclosure except to other persons present in furtherance of the purpose of communication

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Art. 607. [Impeachment]

- At trial, Ps' husband testified that his wife had been injured in the July 6, 2016 accident. Prior inconsistent statement to claims adjuster that was inconsistent with trial testimony allowed to establish that H had previously made statements about his wife's injuries that were inconsistent with his trial testimony.

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Article 511. Clergy-Penitent Privilege

- D had SI with his step-daughter beginning when she was 14 y.o. V and her mother meet with pastor so that V could tell her mother. D arrives later and sits outside door. When V said abuse began when she was 14, pastor could hear D say, "That's not true. That's not true."
- D goes in to give his side of story, to refute what V said. Clergy-

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Art. 607. [Impeachment]

- During, Husband's phone call with adjuster, he said that he did not believe that his W had been injured in the MVA.
- Said that he did not think that W injured her back.
- He also said that W had made prior claims for back injuries.
- And she was lying about head injury.

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Art. 607. [Impeachment]

- CDC case – Jury Trial. Judge Nakisha Ervin Knott. MVA, N. Claiborne in N.O.
- Wife was a passenger in a MV driven by her H.
- 7 hr. wait for police. P then went to St. Bernard Parish Hospital for examination.
- Complained of injury to shoulder, neck, back, knee, and head
- P had surgery for a torn rotator cuff.

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Art. 607. [Impeachment]

- Another Problem - a family practice physician who testified that during his fellowship he was involved with numerous surgeries and experienced more surgeries related to trauma while practicing at the University of Nigeria Nsukka for 30 years.
- Had not performd a surgery in decades.

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Art. 607. [Impeachment]

- Never had been an orthopedic surgeon and had no specialty in rotator cuff surgery.
- Was accepted as an expert in primary care but not surgery.
- He testified as to the surgery and his opinion of the causation of the injury.
- Jury zeroed the P.

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Art. 611 - Demonstrations

- Pertaining to cross-examination of a criminal defendant, the court has discretion to demand that the defendant demonstrate how he acted in self-defense particularly when the sequence of events surrounding the crime are very important.

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Art. 607. [Impeachment]

- Roberts v. Georgia Boxer and Chubb National Insurance Company, 2020 WL 6778472, 2019-1038 (La. Ct. App. 4th Cir. 2020). (finding that an introduction of a prior inconsistent statement is admissible as impeachment evidence when used for the sole purpose of attacking credibility)

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Art. 611 - Demonstrations

- State v. Clark, 2020 WL 6777159, 20-167 (La. Ct. App. 5th Cir. 2020). (finding that trial court had discretion to demand that defendant during cross-examination step down from the witness stand, show how he held the gun when he fired the shots, and demonstrate how the shooting occurred.)

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Art. 607. [Impeachment]

- State v. Clark, 2020 WL 6777159, 20-167 (La. Ct. App. 5th Cir. 2020) (finding that trial court had discretion to demand that defendant during cross-examination step down from the witness stand, show how he held the gun when he fired the shots, and demonstrate how the shooting occurred).

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Art. 611(D) Recross Examination

- State v. Turner, 2020 WL 2753554 (La. Ct. App. 4th Cir. 2020) (finding that no new matters were introduced and thus the district court did not abuse its discretion in refusing to grant defendant the opportunity to recross);

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Art. 701. Opinion testimony by lay witness (traffic citation)

- The fact that a motorist was issued a traffic citation after a MVA is not admissible to show fault. *Deshotels v. Fontenot*, 2010 WL 2179755 (La. App. 3 Cir. 6/2/10).

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Art. 701. Opinion testimony by lay witness (traffic citation)

- On the other hand, the mere payment of a traffic ticket following a motor vehicle accident is not dispositive of the issue of fault or liability. *Hopkins v. Nola*, 58 So.3d 1075 (La.App. 2 Cir. 3/9/11); *Maricle v. Liberty Mut. Ins. Co.*, 898 So.2d 565 (La. App. 3 Cir.2005).

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Art. 701. Opinion testimony by lay witness (traffic citation)

- However, if a motorist pleads guilty to offenses like negligent homicide or reckless operation following an auto accident, the guilty pleas are admissible as personal admissions to show fault. *fn Shephard on Behalf of Shepard v. Scheeler*, 701 So.2d 1308 (1997).

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Art. 701. Opinion testimony by lay witness (traffic citation)

- Where the payment of a traffic citation requires no court appearance, as is allowed under La.R.S. 32:641 where the judges of the various judicial districts are authorized to adopt a parish wide schedule of fines, penalties and costs for violations of traffic laws and where a motorist may enter a written plea of guilty to the traffic violation by signing a declaration to that effect, the traffic citation and payment of the fine may not be introduced at trial.

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Art. 701. Opinion testimony by lay witness (traffic citation)

- However, while a guilty plea is admissible, it is not conclusive evidence. *American Medical Enterprises, Inc. v. Audubon Ins. Co.*, 964 So.2d 1022 (La. App. 1st Cir.6/8/07).

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Art. 701. Opinion testimony by lay witness (traffic citation)

- *Hopkins v. Nola*, 58 So.3d 1075,114 (La. App. 2 Cir. 3/9/11).]

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Art. 701. Opinion testimony by lay witness (Shotspotter)

- State v. Thorton, 309 So.3d 366 (La. Ct. App. 1st Cir. 2020) (holding that district attorney investigator could testify about how he acquired and used information from Shotspotter, a gunshot detection system used to detect the location of gunfire, in the course of his investigation);

Art. 701 – Cell Phone Records

- State v. Jackson, 193 So. 3d 425 (La. Ct. App. 4th Cir. 2016) (holding that determining location by the use of cell phone records is not a subject for expert analysis).

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Art. 701. Opinion testimony by lay witness (Shotspotter)

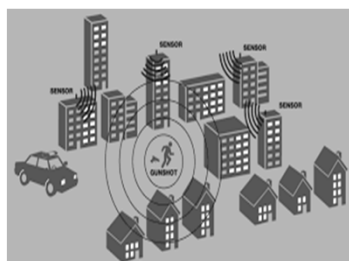
- A gunfire locator or gunshot detection system is a system that detects and conveys the location of gunfire or other weapon fire using acoustic, optical, or potentially other types of sensors, as well as a combination of such sensors. These systems are used by law enforcement, security, military and businesses to identify the source and, in some cases, the direction of gunfire and/or the type of weapon fired.

Art. 701 – Accident Reconstruction by Lay Witness

- Simpson v. U V Insurance Risk Retention Group, Inc., 304 So.3d 1002 (La. Ct. App. 3rd Cir. 2020) (finding in a personal injury action that state trooper may give lay testimony based on his rational perception of the accident scene about whether a any driver committed a traffic violation before a crash).

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Art. 701. Opinion testimony by lay witness (Shotspotter)



Art. 701 – Cell Phone Records

- State v. Morgan, 119 So. 3d 817 (La. Ct. App. 1st Cir. 2013) (finding no error in the trial court's ruling that detective was allowed to testify about data collected from the use of a cellular telephone; a police officer is not required to have expert knowledge regarding the interpretation and explanation of cell phone records).

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Art. 701. Opinion testimony by lay witness (Shotspotter)

- https://en.wikipedia.org/wiki/Gunfire_location

Art. 702. Opinion testimony by expert witness - Daubert

- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.”

Art. 702. Opinion testimony by expert witness - Daubert

- Under this inquiry, the admission of expert testimony is proper only if all 5e of the following are true:
- “(1) the expert is qualified to testify competently regarding the matters he intends to address;

Art. 702. Opinion testimony by expert witness - Daubert

- [4] “... the testimony must be based on sufficient facts or data, C.E. art. 702(A)(2), and;
- [5] ... the expert must reliably apply the principles and methods to the facts of the case,

Art. 702. Opinion testimony by expert witness - Daubert

- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert;

Art. 702. Opinion testimony by expert witness - Daubert

- The Article 702 analysis was used by the LSC to exclude the testimony of an alleged defense biomechanics, injury causation analysis and accident reconstruction expert who wanted to testify that the P was involved in a low speed rear-end motor vehicle collision that subjected him to minimal forces and accelerations

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Art. 702. Opinion testimony by expert witness - Daubert

- and that these forces would cause serious or long-lasting injuries.
- The expert was presented by the defense to opine that the plaintiff's injuries and treatments were not causally related to the subject event.

Art. 702. Opinion testimony by expert witness

- The trial court declined to a doctor as an expert in pharmacology concluding he did not demonstrate “the requisite knowledge, experience, and training with the drug amiodarone.”

Art. 702. Opinion testimony by expert witness

- LSC found that the expert’s testimony was not based on sufficient facts or data b/c the expert never interviewed the P, did not know the P's body position at the time of the accident, did not inspect the actual vehicles involved in the collision, and did not speak to a damage appraiser.

Art. 702. Opinion testimony by expert witness

- Court of Appeal reversed, finding that Article 702 is not so restriction as to require a pharmacologist be an expert specialized to a specific drug. *Lovecchio v. Romain*, 2020 WL 1465943 (La. Ct. App. 4th Cir. 2020).

Art. 702. Opinion testimony by expert witness

- Instead, the expert calculated the impact of the collision on the plaintiff's body based in part on black and white photographs, vehicle repair estimates, and descriptions of the accidents by the parties. *Blair v. Coney*, 2020 WL 1675992 (La. 2020).]

Art. 702. Opinion testimony by expert witness

- Dr. had a Ph.D. in toxicology and pharmacology from Mich.SU; 3y of postgraduate training in cardiovascular pharmacology and physiology at the University of Iowa. Since 2006, he has been the head of the Department of Pharmacology and Experimental Therapeutics at LSU Health

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Art. 702. Opinion testimony by expert witness

- Sciences Center in New Orleans. He has been a professor at LSU for thirty years.
- Dr. Varner is currently an Associate Editor of the scholarly journal Cardiovascular Toxicology and has co-authored approximately sixty peer-reviewed journal articles on various subjects in his field of expertise.

Art. 702. Opinion testimony by expert witness

- State v. Thomas, 297 So. 3d 966 (La. Ct. App. 1st Cir. 2020) (holding that trial court did not err in allowing expert in forensic pediatric medicine to educate the jury about delayed disclosure, progressive disclosure, grooming, suppression of disclosure by a victim's family, multigenerational abuse, “target child syndrome,”

Art. 702. Opinion testimony by expert witness


- Thompson v. Transocean Offshore Deepwater Drilling, Inc., 293 So. 3d 80 (La. Ct. App. 1st Cir. 2020) (holding in a Jones Act case that district court properly excluded the testimony of a boat captain as a safety witness because his opinions were not grounded in methods and procedures of science but on his subjective belief or unsupported speculation;

Art. 702. Opinion testimony by expert witness

- the commonality of “sexting” among teenagers, early participation in sexual activity by children who have been abused, and partial admission by perpetrators).

Art. 702. Opinion testimony by expert witness

- witness was called to testify regarding his personal safety programs that he had designed and implemented for companies that hired him for that purpose, as well as to compare the training programs he had implemented to the one at issue, and to opine as to the safety and reasonableness of programs at issue).

 Q-13 - 801(D)(1)(c) – Statement of Identification

- Second degree murder prosecution - Crime Stopper tips confirmed identification of D as the murderer with the clear implication that the tips named the defendant as the perpetrator of the crime. Admissible?
- A. No, inadmissible hearsay.
- B. Yes, as a statement of identification.
- C. Yes, as a present sense impression.
- D. Yes, as an excited utterance.

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Art. 801(D)(1)(c) – Statement of Identification

- State v. Williams, 280 So. 3d 1185 (La. App. 4 Cir. 2019) (holding that evidence that Crime Stopper tips confirmed identification of as the murderer with the clear implication that the tips named the defendant as the perpetrator of the crime is inadmissible hearsay and not admissible as statement of identification) .

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Art. 803(4) – Statements for purposes of medical treatment and medical diagnosis in connection with treatment

- Coutee v. Rapides Healthcare System, LLC, 2020 WL 1649483 (La. Ct. App. 3rd Cir. 2020) (holding in medical malpractice that statement of hospitalized patient who died after a fall that he wanted to go to the bathroom and did not want to use a bedpan or portable toilet not admissible under Article 803(4))

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Art. 801(D)(2)(a) – Statement by Party-Opponent

- State v. McGee, 2019 WL 1461524 (La. App. 2 Cir. 2019) (holding that where the State has not sought to use a statement of the defendant against him or her, the defendant may not introduce his or her own self-serving statement in an effort to avoid testifying at trial)

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Art. 803(5) – RECORDED RECOLLECTION

- Succession of Fuselier v. Billeaud Sugar Factory, 2020 WL 3444563 (La. Ct. App. 3rd Cir. 2020). (holding in a property dispute action that public records which contained seven affidavits that were hearsay that date back to 1964 were ancient documents and should have been admitted by trial court).

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Art. 803(5) – RECORDED RECOLLECTION

- State v. Ford, 275 So.3d 404 (La. App. 5th Cir. 6/19/19) (court held that video statements that were played to refresh the memories of two witnesses who stated that they could not recall an incident were admissible as recorded recollection.)

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Art. 803(6) & . La. R.S. 13:3714 Certified Medical Records

- Certified medical records are admissible.
- However, before the certified medical records can be admissible, the party against whom the records is sought to be used must have had an opportunity to summon and examine those making the original of the records as witnesses under cross-examination. D learned of records at trial.
- Records inadmissible. Perniciaro v. Hamed, 309 So.3d 813 (La. Ct. App. 5 Cir. 2000).]

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Art. 803(6) Business Records Exception

- *Stevenson v. Progressive Security Insurance Company*, 2020 WL 1671565 (La 2020) (holding in exception of prescription proceeding that fax machine transmission sheets from lawyer's office demonstrating attempts to fax the petition to the office of the clerk of court and an affidavit from the Deputy Clerk setting forth the clerk's policy regarding fax filing to show that clerk of court turns off the fax machines around 4:30 p.m. each day because the fax machines encounter problems such as paper jams admissible under Art. 803(6).

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Article 901 Authentication

- In *Archaga v. Johnson*, 280 So. 3d 331 (La. App. 2 Cir. 2019), the court held that an accountant properly authenticated text messages and emails between the accountant and attorneys concerning the parties' oral agreement for accounting services when the accountant presented photocopies of screenshots of the text messages and email exchanges at the trial.

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Article 901 Authentication

- *State v. Dillon*, 2018 WL 4520463 (La. Ct. App. 1 Cir. 9/21/18). Molestation of a juvenile.
- Defense – mom's boyfriend made this up.
- Screenshot of a FB message from the boyfriend of the mother of the victims to D's mother which would have exonerated D not properly authenticated. Only 1 message received, and 1 year after act.

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Article 901 Authentication

- In *Archaga v. Johnson*, 280 So. 3d 331 (La. App. 2 Cir. 2019)
- P charges a flat fee of \$25,000 for over 400 hours of work in preparing their tax returns, which she discounted by 65% b/c of their longstanding friendship. Mrs. Johnson did not request a written invoice. They also agreed that D would pay an additional \$5,000 in order to prepare the 2016 tax returns.

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Q-14 - Article 901 Authentication of text messages

- Accountant sues lawyer for accounting fees. Accountant wants to present into evidence photocopies of screenshots of text messages and emails between the parties regarding their oral agreement for accounting. Admissible?
- A. Yes, b/c properly authenticated.
- B. No, b/c photocopies of texts & emails are inadmissible.
- C. Only if the accountant introduces the phone into evidence.

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Q-15 - Article 901 Authentication of text messages

- Attempted murder prosecution. D tried to kill his girlfriend. Cop took photos of threatening text messages on V's phone. State wants to introduce texts into evidence. How should this be done?
- A. By calling the cop to testify.
- B. By calling the victim to testify.
- C. By calling both to testify.
- D. By also introducing the phone into evidence.

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Article 901 Authentication

- State v. Harris, 266 So. 3d 953 (La. App. 2 Cir. 2019) (holding that threatening text messages were properly authenticated when recipient is familiar with sender's telephone number and can testify to circumstances surrounding messages).

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Article 901 Authentication

- The note, which was found in the defendant's car at the time of his arrest, discussed intimate details of his life that affected his emotional state and caused him to commit the act in question, stated his regret for the killing, and spoke from the point of view of the father of the couple's child. State v. Guidry, 271 So. 3d 275 (La. Ct. App. 3 Cir. 2019).

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Q-16 - Article 901 Authentication of unauthenticated note

- D was tried for killing his girlfriend. An unauthenticated, unsigned note was found in his car stating that he killed V b/c of a rage that built up inside of him & b/c of stress from dealing with a newborn, school, and their relationship. There was no handwriting expert. Is the note admissible?
- A. No, b/c it is not authenticated.
- B. Yes, because it was more likely written by D.

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Q-17 - Authentication of Google Images

- Dispute over a predial servitude/right of way. One party wants to introduce Google Earth images by showing where his house and property lines are. No expert & no one from Google called. Admissible?
- A. Yes, b/c properly authenticated.
- B. No, b/c Google rep. must be present.
- C. No, b/c someone else must authenticate Google images.

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Article 901 Authentication

- Article 901 allows for the contents of a writing to be considered with the circumstances to determine the authenticity of the writing. In State v. Guidry, the court held that circumstances surrounding an undated, unsigned, handwritten note where the author explained why he killed the victim were sufficient to authenticate the note.

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Article 901 Authentication

- In another case involving technology, Walker v. S.G.B.C., 2020 WL 563818 (La. App. 3 Cir. 2019), which concerned a dispute over a predial servitude/right of way, the court held that Google Earth images are properly authenticated by witnesses who testify that they recognize the images and confirm that the images show the property in question.

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Article 901 Authentication

- To authenticate the images, it is not necessary to have the creator of the images testify to their authenticity, get a certification from Google that the images are what they purported to be; or to have an expert testify that the images were accurate depictions of what they claimed to be.^{fn.}

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Art. 1101. Applicability [of LCE]

- *State v. Delaneuville*, 283 So 3d. 1065 (La. App. 5 Cir. 2019) (holding that hearsay is admissible at preliminary examinations in criminal cases);

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Article 901 Authentication

- Consequently, the authentication of images from Google Earth is similar to authenticating a photograph in that the proponent of the evidence need only call a witness with knowledge of the contents depicted; it is not necessary for the proponent to call the photographer or the creator of the photograph.

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- Thanks for your time and interest.
- Bobby Harges

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Art. 1004. Admissibility of other evidence of contents

- In *Burtner v. Burtner*, the court held that when both parties introduce identical copies of a pre-marital contract indicating that there is agreement between them as to the authenticity of the contract, the court may accept the copies as substitutes for the original.^{fn.} [fn. *Burtner v. Burtner*, 2019 WL 4855334 (La. App. 1 Cir. 2019).] In this instance, the original is not required.]