

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-21961-GAYLES/OTAZO-REYES

VIVIAN RUGGERI,

Plaintiff,

v.

NCL (BAHAMAS) LTD.  
*doing business as*  
NORWEGIAN CRUISE LINE,

Defendant.

**DAUBERT ORDER**

THIS CAUSE came before the Court upon Defendant NCL (Bahamas) Ltd.’s (“Defendant”) Daubert Motion to Exclude Certain Expert Testimony of Captain Hendrik J. Keijer (“Captain Keijer”) (hereafter, “Daubert Motion”) [D.E. 30]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Darrin P. Gayles, United States District Judge [D.E. 33]. The undersigned held a hearing on this matter on February 6, 2023 (hereafter, “Hearing”). For the reasons stated below, Defendant’s Daubert Motion is DENIED.

**PROCEDURAL AND FACTUAL BACKGROUND**

On May 11, 2020, Plaintiff Vivian Ruggeri (“Plaintiff”) commenced this maritime personal injury action against Defendant, alleging that she had sustained an injury while aboard a lifeboat operated by Defendant as she returned to its vessel *Epic* after a shore excursion. See Compl. [D.E. 1]. Specifically, Plaintiff alleges that, on October 25, 2019, the lifeboat, which was being used as a tender vessel at the time of the incident, crashed into a floating dock as it approached the *Epic*, resulting in an injury to Plaintiff’s right shoulder. Id. ¶ 18. Pursuant to these allegations, Plaintiff asserts the following claims against Defendant:

(1) negligent failure to warn; (2) negligent training of personnel; and (3) negligent supervision of personnel. Id. at 7–22.

On December 28, 2022, Defendant filed its Daubert Motion [D.E. 30] seeking to exclude the opinions set forth in Captain Keijer’s August 30, 2022, rebuttal report (hereafter, “Keijer Rebuttal Report”) [D.E. 43-1] regarding the tender vessel’s speed and angle of roll on the grounds that his methodology is unreliable, and that his opinions are unhelpful to the trier of fact. On January 20, 2023, Plaintiff filed her Response in Opposition to Defendant’s Daubert Motion (hereafter, “Response”) [D.E. 43]; and on January 27, 2023, Defendant filed its Reply in Support of its Daubert Motion (hereafter, “Reply”) [D.E. 46].

### **DAUBERT STANDARDS**

Rule 702 of the Federal Rules of Evidence (hereafter, “Rule 702”) provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. A party who seeks to admit expert testimony bears the burden of laying the proper foundation for its admissibility by a preponderance of the evidence. Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999). Thus, before expert testimony may be admitted as evidence at trial pursuant to Rule 702, the district court must act as a gatekeeper and screen the proffered evidence. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596–97 (1993). In the Eleventh Circuit, this gatekeeping function must be performed as follows:

[I]n determining the admissibility of expert testimony under Rule 702, [the court must] engage in a rigorous three-part inquiry [and] must consider whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (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.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (citing City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998)). “A district court’s gatekeeper role under *Daubert* ‘is not intended to supplant the adversary system or the role of the jury.’” Maiz v. Virani, 253 F.3d 641, 666 (11th Cir. 2001) (quoting Allison, 184 F.3d at 1311). Rather, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Daubert, 509 U.S. at 596 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)). “Rejection of an expert’s testimony is the exception rather than the rule . . . .” Adega v. State Farm Fire & Cas. Ins. Co., No. 07-CV-20696, 2010 WL 11506354, at \*1 (S.D. Fla. Mar. 30, 2010).

### **DISCUSSION**

As noted above, Defendant seeks to exclude Captain Keijer’s rebuttal opinions regarding the tender vessel’s speed and angle of roll on the grounds that they are: (1) derived from an unreliable methodology; and (2) unhelpful to the trier of fact. The undersigned addresses each of these arguments in turn.

#### ***1. Whether Captain Keijer’s methodology is unreliable.***

In his rebuttal report, Captain Keijer addresses the opinions of Defendant’s expert, Captain John B. Harestad (“Captain Harestad”), regarding the tender vessel’s speed and angle of roll at the time of the subject incident. Captain Keijer analyzed CCTV extracts of the subject incident and calculated that the tender vessel “was not travelling at Captain Harestad’s

alleged 3 knots” but rather “approach[ed] at an excessive speed of 6 knots, abruptly slowed down to 3 knots and increased speed again to 4 knots in close vicinity to the tender platform followed by [the] collision.” See Keijer Rebuttal Report [D.E. 43-1 at 3, 7]; see also Exhibit D to Keijer Rebuttal Report [D.E. 43-2] (setting forth Captain Keijer’s speed calculations). Captain Keijer then opined that “the approach of the tender [vessel] to the ship’s platform was unreasonably fast, [and] contained an abrupt slow down, followed by an increase in speed in remarkably close proximity to the platform with which it collided.” See Keijer Rebuttal Report [D.E. 43-1 at 3].

Captain Keijer also superimposed triangles on the CCTV extracts to represent the rolls of the tender vessel upon its impact with the floating dock. See Exhibit C to Keijer Rebuttal Report [D.E. 43-4]. Captain Keijer then measured the side lengths of the triangles and applied the trigonometric tangent function to determine that the tender vessel “rolled approximately 10° to port following the collision with the platform” and “9° to starboard following its collision with the platform.” Id. at 1–2; see also Keijer Rebuttal Report [D.E. 43-1 at 3]. Captain Keijer concluded that “the tender [vessel] rolled an unreasonable 10 degrees despite favorable weather conditions.” See Keijer Rebuttal Report [D.E. 43-1 at 3].

Defendant seeks to exclude the opinions set forth in Captain Keijer’s rebuttal report because they “have not and cannot be verified by any scientific methods and . . . are purely speculative and not generally accepted in the scientific community.” See Daubert Motion [D.E. 30 at 7]. Specifically, Defendant argues that Captain Keijer relied solely on his observations of a CCTV video and did not articulate a rate of error for his speed calculations; and that Captain Keijer’s use of basic trigonometry to determine the tender vessel’s angles of roll from CCTV footage does not qualify as a reliable methodology. Id. at 6–7; see also Reply

[D.E. 46 at 3–6]. Defendant further contends that Captain Keijer erroneously used the tangent function on non-right triangles to calculate the tender vessel’s angles of roll. See Reply [D.E. 46 at 7].

At the Hearing, Captain Keijer testified that, as a former cruise ship captain with decades of sailing experience, he often relied on CCTV footage and applied trigonometry to calculate the movement of other vessels in the area. Captain Keijer also clarified that the rate of error for his speed calculations is set forth in his file, see Plaintiff’s Notice of Filing at Exhibit 3 [D.E. 53-3], and that his calculations all fell within a negligible margin of error that did not affect his conclusion about the excessiveness of the tender vessel’s speed. Moreover, Captain Keijer corrected a scrivener’s error in one of the side lengths of the triangles that he drew to calculate the tender vessel’s angles of roll, thereby converting them to right triangles for which the application of the tangent function was proper. Nevertheless, Captain Keijer testified that the side length containing the scrivener’s error had not been used in his trigonometric calculations and was therefore immaterial to his conclusion about the unreasonableness of the roll angle.

Having considered Captain Keijer’s testimony, the undersigned finds that Captain Keijer’s methodology is sufficiently reliable and that Defendant’s arguments go to the weight of his expert opinion and are more appropriately addressed by “vigorous cross-examination” and “presentation of contrary evidence.” Daubert, 509 U.S. at 596.

***2. Whether Captain Keijer’s opinions are unhelpful to the trier of fact.***

Defendant further argues that Captain Keijer’s opinions will not be helpful to the trier of fact in this bench trial. See Daubert Motion [D.E. 30 at 8]; Reply [D.E. 46 at 2]. However, in a bench trial, “the Court as a fact finder is presumably competent to disregard what he thinks he should not have heard, or to discount it for practical and sensible reasons.” Adams

v. Paradise Cruise Line Operator Ltd., Inc., No. 19-cv-61141, 2020 WL 3489366, at \*3 (S.D. Fla. June 26, 2020) (quotation marks and citations omitted). Indeed, “the danger involved with [] expert testimony, namely that the jury will be unduly influenced, is not implicated in a bench trial.” Id. (quotation marks and citations omitted). As such, Captain Keijer’s opinions may be challenged at trial by “vigorous cross-examination” and “presentation of contrary evidence”, Daubert, 509 U.S. at 596, and “the Court as fact finder is free to later decide to disregard testimony in whole or in part and/or to decide how much weight to give it.” See Adams, 2020 WL 3489366, at \*4 (internal quotation marks omitted) (quoting GLF Constr. Corp. v. Fedcon Joint Venture, No. 8:17-cv-1932-T-36AAS, 2019 WL 7423552, at \*3 (M.D. Fla. Oct. 15, 2019)).

**CONCLUSION**

Based on the foregoing considerations, it is ORDERED AND ADJUDGED that Defendant’s Daubert Motion [D.E. 30] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29<sup>th</sup> day of March, 2023.

  
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ALICIA M. OTAZO-REYES  
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Darrin P. Gayles  
Counsel of Record