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TAKING THE SIZZLE OUT OF THE FRYE RULE: *DAUBERT V. MERRELL DOW PHARMACEUTICALS* OPENS THE DOOR TO NOVEL EXPERT TESTIMONY

A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.

—Max Planck¹

I. INTRODUCTION

In *Frye v. United States*,² the Court of Appeals of the District of Columbia affirmed a trial court's exclusion of lie detector test results on the ground that such tests had not been "generally accepted" by the scientific community. The *Frye* rule, or "general acceptance" standard, quickly became the dominant test for the admission of scientific evidence. Decided in 1923, *Frye* governed evidentiary decisions in a majority of federal circuits for the next seventy years. The adoption of the Federal Rules of Evidence in 1975, however, prompted several judges to question the validity of *Frye*. Since the enactment of the Rules debate has surrounded the standards governing the admissibility of expert testimony.

The United States Supreme Court ended the debate in *Daubert v. Merrell Dow Pharmaceuticals*.³ The Court unanimously held that the *Frye* "general acceptance" standard was no longer the appropriate test for deciding the admissibility of expert evidence, adding that the adoption of the Federal Rules of Evidence superseded *Frye*. Instead, the Court found "cross-examination, presentation of contrary evidence, and careful in-

1. MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 33-34 (Frank Gaynor trans., 1950), reprinted in RESPECTFULLY QUOTED 313 (Suzy Platt ed., 1989).

2. 293 F. 1013 (D.C. Cir. 1923).

3. 113 S. Ct. 2786 (1993).

struction on the burden of proof; . . . rather than wholesale exclusion under an uncompromising 'general acceptance' test," to be the appropriate means for challenging evidence.⁴

This Casenote examines the development of the admissibility of expert opinion over the past seventy years. Specifically, part two of this Casenote explores the dominant common law rule for admitting expert opinion, the *Frye* "general acceptance" test, and details the jurisdictional split over the applicability of this doctrine. Part three focuses on the enactment of the Federal Rules of Evidence and explores the impact of the Federal Rules on the common law theories of admissibility. Part four is an overview of the *Daubert* decision, exploring the lower court and Supreme Court opinions in the case. Finally, part five considers the potential impact of the *Daubert* opinion.

II. ADMISSIBILITY OF EXPERT SCIENTIFIC TESTIMONY UNDER COMMON LAW

A. "General Acceptance" Standard

In 1923, the Court of Appeals of the District of Columbia upheld the exclusion of the results from a systolic blood pressure deception test, a precursor to modern lie detector tests, in *Frye v. United States*.⁵ In a notably brief opinion, which cited no authority, the court successfully curtailed the admission of novel scientific evidence in criminal and civil trials for decades to follow. While the United States Supreme Court never endorsed the *Frye* decision, a majority of federal courts followed the ruling. The case has been cited most frequently for its language regarding the "general acceptance" of scientific principles:⁶

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony

4. *Id.* at 2798.

5. 293 F. 1013 (D.C. Cir. 1923).

6. See Andre A. Moenssens, *Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 WM. & MARY L. REV. 545, 547 n.11 (1984).

deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁷

This legal theory has been used to exclude expert testimony regarding such novel scientific fields as “[p]olygraphy, graphology, hypnotic and drug induced testimony, voice stress analysis, voice spectrograms, ion microprobe mass spectroscopy, infrared sensing of aircraft, retesting of breath samples for alcohol content, psychological profiles of battered women and child abusers, post traumatic stress disorder as indicating rape, astronomical calculations, and blood group typing.”⁸ The *Frye* rule was fashioned to “shield jurors from the influence of testimony that might sound more impressive than it actually is.”⁹ The “general acceptance” standard forced trial courts to bar the testimony of expert witnesses who were unable to garner peer support for their novel theories, rather than risk consideration of such evidence by a jury.

B. *Division over Frye*

Although followed by some courts for more than seventy years, the *Frye* rule has been heavily criticized.¹⁰ One commen-

7. *Frye*, 293 F. at 1014.

8. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 203, at 363 (4th ed. 1992).

9. Moenssens, *supra* note 6, at 546. He adds that “[m]any courts favor a conservative approach because juries may be overly impressed by experts with seemingly impressive credentials. Additionally, juries may give greater weight to expert opinions than the opinions deserve on the basis of scientific validity.” *Id.*

10. See BROUN et. al., *supra* note 8, § 203, at 363-64 leading the criticism: Most commentators agree, however, that these objectives can be attained satisfactorily with less drastic constraints on the admissibility of scientific evidence. In particular, it has been suggested that a substantial acceptance test be substituted for the general acceptance standard, that courts look directly to reliability or validity rather than to the extent of acceptance, that scientific evidence be admitted freely, coupled with testimony of an expert appointed by the court if it finds that the testimony would be subject to “substantial doubt in peer review by the scientific community,” that a panel of scientists rather than the usual courts screen new developments for acceptance, and that the traditional standards of relevancy and the need for expertise—and nothing more—should govern.

Id. at 363.

tator described the rule as "easier to state than apply."¹¹ Another author wrote that *Frye* "excludes recent yet valid scientific findings from the fact finding process and . . . determines scientific reliability based on 'nose counting.'"¹² Commentators also blamed *Frye* for impeding scientific development. "It has been argued that scientific expert witnesses, by the very nature of the legal process, have been forced to assume a role which compromises the very essence of scientific impartiality. It would appear that this has largely been the consequence of the consensual standard put forward in *Frye*."¹³

Criticism of the *Frye* test has not been confined to scholarly writings. Members of the judiciary debated the validity of the rule as well. Several courts renounced the "general acceptance" rule completely.¹⁴ Even courts applying *Frye* have noted its weaknesses. "For example, the D.C. Circuit—in which the *Frye* test originated—observed that *Frye* tended to retard the admission of proof derived from novel methods of scientific investigation"¹⁵

The *Daubert* decision ended the jurisdictional split over the applicability of the "general acceptance" standard. Before *Daubert*, a majority of the federal circuits followed the rule set out in *Frye v. United States*. The Court of Appeals for the Eighth Circuit ruled that *Frye* was a proper standard for declining the admissibility of expert testimony in *United States v. Two Bulls*.¹⁶ The court rationalized that "[r]egardless of which rule may be followed, . . . Rule 702 and *Frye* both require the same general approach to the admissibility of new scientific evidence. Neither rule should permit speculative and conjectural testing which fails normal foundational requirements necessary for the admissibility of scientific testimony or opinion."¹⁷

11. Moenssens, *supra* note 6, at 548.

12. Steven J. Grossman & Christopher K. Gagne, *Science and Scientific Evidence II*, 25 CONN. L. REV. 1053, 1055 (1993) (citation omitted).

13. *Id.* at 1064 (citation omitted).

14. See *infra* text accompanying notes 32-38.

15. William D. Quarles, *High Court States Flexible Standard for the Admission of Expert Testimony*, INSIDE LITIG., Aug. 1993, at 16 (citing *United States v. Addison*, 498 F.2d 741, 743-44 (D.C. Cir. 1974).

16. 918 F.2d 56 (8th Cir. 1990).

17. *Id.* at 60.

The Fifth Circuit relied on *Frye* to exclude expert testimony regarding the alleged cause of the plaintiff's cancer in *Christophersen v. Allied-Signal Corp.*¹⁸ Holding that the "*Frye* question focuses on the proffered methodology alone and looks to the scientific community to determine if general support for that methodology exists," the court concluded that "Dr. Miller's presumption . . . has no support in medical science and . . . failed to clear either the Rule 703 or the *Frye* hurdle."¹⁹

In *United States v. Smith*,²⁰ the Seventh Circuit cited *Frye* when reversing the trial court's admission of spectrographic voice identification. The court confirmed that "[a]lthough the validity of the judge-made rule in *Frye* has been criticized by some courts and commentators for numerous reasons, this circuit has continued to affirm (and to apply) the *Frye* standard."²¹

The Sixth Circuit also ruled that *Frye* was controlling in *United States v. Metzger*.²² The defendant challenged testimony regarding the use of thin-layer chromatography to discover trace amounts of dynamite. The court ruled that the evidence had been admitted properly because it met the "general acceptance" standard articulated in *Frye*.²³

Frye was the governing standard in *United States v. Smith*,²⁴ decided by the Court of Appeals for the Tenth Circuit. The Eleventh Circuit followed suit, applying the "general acceptance" standard in *United States v. Julio Piccinonna*.²⁵

Finally, the Court of Appeals for the Ninth Circuit excluded expert testimony in *Daubert* on the grounds that the evidence was not "generally accepted" in the scientific community. This decision, however, was overturned by the Supreme Court.²⁶

18. 939 F.2d 1106 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1280 (1992).

19. *Id.* at 1115-16.

20. 869 F.2d 348 (7th Cir. 1989).

21. *Id.* at 351.

22. 778 F.2d 1195 (6th Cir. 1985), cert. denied, 477 U.S. 906 (1986).

23. *Id.* at 1203-04.

24. 776 F.2d 892, 898 (10th Cir. 1985).

25. 885 F.2d 1529, 1532 (11th Cir. 1989).

26. 951 F.2d 1128, 1131 (9th Cir. 1991), rev'd, 113 S. Ct. 2786 (1993).

In contrast, several other jurisdictions refused to apply the *Frye* "general acceptance" test in all cases. In *United States v. Jakobetz*,²⁷ the Court of Appeals for the Second Circuit held that the trial court had properly admitted evidence of DNA analysis. The court cited *United States v. Williams*,²⁸ in which it ruled that the Federal Rules of Evidence superseded *Frye*.²⁹ The court concluded that a more liberal approach to admitting scientific evidence was appropriate.³⁰

The Third Circuit also ruled that *Frye* was an improper standard in *DeLuca v. Merrell Dow Pharmaceuticals*.³¹ The court permitted an expert witness to testify to epidemiological studies linking birth defects to the morning sickness drug manufactured by the defendant.³² The court reasoned:

In *Downing*, we explicitly rejected reliance upon the "general acceptance" test of admissibility, most prominently articulated in *Frye v. United States* We did so, for among other reasons, because the general acceptance test was too vague and malleable to yield consistent results, and because its nose-counting emphasis often led to the exclusion of helpful evidence in contradiction to the spirit of the Federal Rules of Evidence.³³

While the Fourth Circuit has not renounced the *Frye* rule entirely, it has avoided its application. In *Ellis v. International Playtex, Inc.*,³⁴ the court considered the admissibility of plaintiff's scientific data under the hearsay rule, and avoided scrutinizing the evidence under *Frye*.

[B]y applying 803(8)(C) and thus requiring Playtex to challenge the credibility of the reports before the jury and not the judge, our decision today creates a result that permits the trial court and the litigants to skirt the difficulties

27. 955 F.2d 786 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992).

28. 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

29. *Id.* at 1198.

30. 955 F.2d at 794, 796.

31. 911 F.2d 941 (3d Cir. 1990).

32. *Id.* at 949, 956.

33. *Id.* at 955.

34. 745 F.2d 292 (4th Cir. 1984).

posed by Frye without sacrificing the continued survival of the rule.³⁵

III. ADMISSIBILITY OF EXPERT SCIENTIFIC TESTIMONY UNDER THE FEDERAL RULES OF EVIDENCE

A. Federal Rules 702 and 703

In 1975 Congress enacted the Federal Rules of Evidence. Specifically Rules 702 and 703 address the admissibility of expert opinion. The Rules do not codify the "general acceptance" language of *Frye*. Instead, the Rules modify common law principles of evidence by liberalizing the restrictions on expert testimony.³⁶ Moreover, Rule 402 expressly provides that "all relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."³⁷ Many commentators, as well as the plaintiffs in the *Daubert* case,³⁸ have argued that excluding relevant evidence solely on the ground that the expert opinion is not "generally accepted" violates Rule 402 of the Federal Rules of Evidence.³⁹

Rule 702 governs the admission of testimony by expert witnesses. The Rule provides "[i]f a scientific, technical, or other

35. *Id.* at 304. "Although this court has expressed concern over the *Frye* rule, we have continued to recognize its validity in certain circumstances." *Id.* at 304 n.15 (citing *United States v. Gould*, 741 F.2d 45 (4th Cir. 1984)).

36. See Michael C. McCarthy, Note, "Helpful" or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703, 77 CORNELL L. REV. 350, 354 (1992). "Although Rule 702 did not significantly depart from the common law, when combined with the other rules governing expert testimony, particularly Rule 703, 'the door to expert testimony [was] opened far wider than before.'" *Id.* (citing 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 380, at 633 (1979)).

37. FED. R. EVID. 402.

38. See, e.g., Petitioners' Brief at 19, *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993) (No. 92-102).

39. See Quarles, *supra* note 15, at 17. "A particularly restrictive technique for enforcing *Frye's* general acceptance requirement was a heightened relevancy standard that directly contradicts the Federal Rules' sweeping presumption of admissibility for relevant evidence: with clearly delineated exceptions '(a)ll relevant evidence is admissible.'" *Id.*

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁴⁰ The "general acceptance" language emphasized in *Frye* does not appear in Rule 702 or in the comments following the rule. Rule 702 clearly requires that expert testimony be helpful, but it does not require that it be "generally accepted." One practicing litigator argues that "Rule 702 embodies an inclusive approach to expert witnesses that emphasizes a pragmatic consideration whether proffered evidence would assist the factfinder and de-emphasizes narrow, formal requirements."⁴¹

Rule 703 addresses the bases of opinion testimony by expert witnesses. First, the Rule provides that an expert may base his opinion on "facts or data . . . perceived by or made known to [him] at or before the hearing."⁴² Additionally, the Rule notes that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."⁴³ The Rule permits an expert to base his opinions on inadmissible evidence, provided the evidence is "reasonably relied" on by members of the field. The Rule does not, however, expressly require that the substance of an expert's testimony be "generally accepted" by the scientific community.

B. *Impact of Federal Rules on Frye*

Following the enactment of the Federal Rules of Evidence, many commentators argued that *Frye* had been overturned,⁴⁴ reasoning that:

These rules do not explicitly distinguish between scientific and other forms of expert testimony, and they permit experts to rely on facts or data not otherwise admissible into

40. FED. R. EVID. 702.

41. Quarles, *supra* note 15, at 17.

42. FED. R. EVID. 703.

43. *Id.*

44. Quarles, *supra* note 15, at 17. "Proponents of a lower threshold for the admissibility of scientific evidence discerned in the Federal Rules of Evidence a 'helpfulness' standard for guiding the admissibility determination." *Id.* at 16.

evidence as long as they are "reasonably relied upon by experts in [the] particular field." Plainly, "reasonable reliance" is not synonymous with general acceptance.⁴⁵

Conversely, some commentators argued that the viability of the *Frye* test was evidenced by its long survival.⁴⁶

The courts remained divided, however, on the question of whether the *Frye* rule and the Federal Rules of Evidence could coexist. In *Christophersen v. Allied-Signal Corp.*,⁴⁷ the Court of Appeals for the Fifth Circuit concluded that the *Frye* rule was incorporated into the Federal Rules.⁴⁸ In *United States v. Williams*,⁴⁹ however, the Second Circuit held that *Frye* was no longer a viable test for determining the admissibility of a novel scientific technique. The court upheld the use of spectrographic voice analysis as a means of identifying a criminal defendant.⁵⁰

A determination of reliability cannot rest solely on a process of "counting (scientific) noses." . . . [U]nanimity of opinion in the scientific community, on virtually any scientific question, is extremely rare. Only slightly less rare is a strong majority. Doubtless, a technique unable to garner any support, or only minuscule support, within the scientific community would be found unreliable by a court. In testing for admissibility of a particular type of scientific evidence, whatever the scientific "voting" pattern may be, the courts cannot in any event surrender to scientists the responsibility for determining the reliability of that evidence.⁵¹

Nearly twenty years after the enactment of the Federal Rules of Evidence, the Supreme Court ended all speculation with its decision in *Daubert*. While the "general acceptance" of a scientific theory may be a factor in a court's overall determination of

45. BROWN et. al., *supra* note 8, § 203, at 363.

46. See James E. Starrs, *Frye v. United States Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, JURIMETRICS J., 1986, at 249. "The general acceptance or *Frye* standard for the admissibility of scientific evidence has been besieged and bombarded ever since its pronouncement in 1923, but it has withstood every scholarly, judicial, and legislative assault." *Id.*

47. 939 F.2d 1106 (5th Cir. 1991)(en banc), *cert. denied*, 112 S. Ct. 1280 (1992).

48. *Id.* at 1110.

49. 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 493 U.S. 1117 (1979).

50. *Id.* at 1195.

51. *Id.* at 1198.

admissibility, the Supreme Court declared that the Federal Rules supersede the law of *Frye v. United States*.⁵²

IV. *DAUBERT V. MERRELL DOW PHARMACEUTICALS*

A. *The Lower Courts*

In 1989, defendant Merrell Dow Pharmaceuticals moved for summary judgment in a personal injury suit filed on behalf of infant plaintiffs Jason Daubert and Eric Schuller.⁵³ Daubert and Schuller were born with serious limb reduction birth defects allegedly caused by their mothers' ingestion of Bendectin, a drug prescribed to pregnant women for "morning sickness" and manufactured by Merrell Dow.⁵⁴ The defendants successfully argued that there was no genuine issue of material fact regarding causation.⁵⁵ The defense submitted an affidavit from a physician who concluded that Bendectin and birth defects were not statistically related after he reviewed more than thirty published studies on the matter.⁵⁶ The plaintiff's only expert evidence, however, was based on animal tests and the reanalysis of previously conducted studies.⁵⁷ The court refused to admit testimony from the plaintiff's expert witnesses on the grounds that the opinions did not stem from statistically significant epidemiological studies.⁵⁸ The court concluded that without such studies, plaintiff's evidence was not sufficiently reliable to pass the "general acceptance" test.⁵⁹ Unable to meet this evidentiary burden, the plaintiffs could not present a genuine question linking the cause of Daubert and Schuller's injuries to Bendectin:

Federal Rule of Evidence (FRE) 703, restricts the admissibility of scientific evidence. "A necessary predicate to the admission of scientific evidence is the principle upon which

52. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2793 (1993).

53. *Daubert v. Merrell Dow Pharmaceuticals*, 727 F. Supp. 570 (S.D. Cal. 1989).

54. *Id.* at 571.

55. *Id.*

56. *Daubert*, 113 S. Ct. at 2791.

57. *Daubert*, 727 F. Supp. at 574-75.

58. *Id.* at 575.

59. *See id.* at 572-75.

it is based 'must be sufficiently established to have general acceptance in the field to which it belongs.'" Therefore, expert opinion not based on facts or data "of a type reasonably relied upon by experts in the particular field" is not helpful, but instead is confusing or misleading and should therefore be excluded. "Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been met, are matters of law for the court to decide."⁶⁰

The Court of Appeals for the Ninth Circuit upheld the district court's award of summary judgment.⁶¹ Citing *United States v. Solomon*,⁶² a Ninth Circuit decision which applied the *Frye* rule, the court found that:

For expert opinion based on a given scientific methodology to be admissible, the methodology cannot diverge significantly from the procedures accepted by recognized authorities in the field. If it does so diverge, it cannot be shown to be "generally accepted as a reliable technique," and a district court must exclude it.⁶³

The court concluded that the reanalysis of epidemiological studies by the plaintiffs' witnesses was not an appropriate basis for expert testimony.

[T]he reanalysis of epidemiological studies is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field. Plaintiffs' reanalyses do not comply with this standard; they were unpublished, not subjected to the normal peer review process, and generated solely for use in litigation.⁶⁴

60. *Id.* at 572 (quoting *Richardson v. Richardson-Merrell*, 857 F.2d 823, 829 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989); *Barrell of Fun, Inc. v. State Farm Fire and Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir. 1984); *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)).

61. *Daubert v. Merrell Dow Pharmaceuticals*, 951 F.2d 1128 (9th Cir. 1991).

62. 753 F.2d 1522 (9th Cir. 1985).

63. 951 F.2d at 1130 (citing *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir. 1985); *Lindsey v. United States*, 237 F.2d 893, 897-98 (9th Cir. 1956)).

64. 951 F.2d at 1131 (citing Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact*, 7 HARV. ENVTL. L. REV. 429, 438-39 (1983)).

Despite the persuasiveness of the reanalyses and animal tests linking Bendectin with birth defects, the plaintiffs' expert evidence was excluded. The *Frye* rule barred the plaintiffs from making a prima facie case against the drug manufacturers.

B. *The Supreme Court*

In 1993 the Supreme Court granted certiorari "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony."⁶⁵ The Court noted that while "the 'general acceptance' test has been the dominant standard" for more than seventy years, the jurisdictions were still significantly divided on the issue.⁶⁶ The Court specifically cited to the division between the D.C. Circuit and the Third Circuit on this matter.⁶⁷ The Court ended the debate, however, ruling that the Federal Rules of Evidence had superseded the *Frye* test.⁶⁸

The Petitioners successfully argued that the district court had improperly excluded expert evidence by deciding its admissibility under the *Frye* standards. The Court agreed that the "general acceptance" test was displaced by the adoption of the Federal Rules of Evidence. Citing Federal Rule 402, the Court stressed that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."⁶⁹ Given that the Federal Rules did not limit relevant evidence to that which is "generally accepted," the Court ruled that the *Frye* standard was not a conclusive factor for deciding the admissibility of expert testimony.⁷⁰

65. 113 S. Ct. 2786, 2792 (1993).

66. *Id.* at 2792-93.

67. *Id.* at 2792 (comparing *United States v. Shorter*, 809 F.2d 54, 59-60 (D.C. Cir.) (following the "general acceptance" standard), *cert. denied*, 484 U.S. 817 (1987) with *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941, 955 (3d Cir. 1990) (refusing to apply the "general acceptance" test)).

68. 113 S. Ct. at 2793.

69. *Id.* at 2793-94 (quoting FED. R. EVID. 402).

70. 113 S. Ct. at 2793-94.

The Court also examined Federal Rule 702 governing expert testimony. Again the Court found that the Federal Rules did not embody the rigid *Frye* standard:

Nothing in the text of this Rules establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history makes no mention of *Frye*, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony.” Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing.⁷¹

The Court did not conclude, however, that expert evidence could be admitted without any limitations. The justices confirmed that admissible scientific evidence must still be reliable in addition to being relevant.⁷² Such a requirement, however, is derived from the Federal Rules of Evidence, not *United States v. Frye*.⁷³

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify The subject of an expert’s testimony must be “scientific . . . knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation Of course, it would be unreasonable to conclude that the subject of scientific testimony must be

71. *Id.* at 2794 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (citations omitted)).

72. 113 S. Ct. at 2794-95:

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

Id. (citations omitted).

73. *Id.*

"known" to a certainty; arguably, there are no certainties in science.⁷⁴

Finally, the Court held that a judge ruling on admissibility may still consider the "general acceptance" of a scientific technique or theory.⁷⁵ Relevant evidence is that which will "assist the trier of fact to understand the evidence or to determine a fact in issue."⁷⁶ "General acceptance" may be a factor in a judges' determination of the helpfulness of the evidence. The results of such an inquiry are merely one factor, however, and should not be dispositive.⁷⁷ "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one."⁷⁸ The trial judge is to act as a gatekeeper, screening out evidence that does not meet the requirements of the Federal Rules of Evidence. Evidence that does meet the federal guidelines, however, should be admitted.

Vigorous 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 These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.⁷⁹

V. POTENTIAL IMPACT OF *DAUBERT*

Predictions about *Daubert's* impact vary. Not surprisingly, the plaintiffs and defense bars disagree on the force of the Supreme Court's ruling. Many defense attorneys believe the effects of the decision will be minimal.⁸⁰ One practitioner writes that "[n]otwithstanding the apparently more relaxed standard for the

74. *Id.* (citation omitted).

75. *Id.* at 2797.

76. FED. R. EVID. 702.

77. 113 S. Ct. at 2797.

78. *Id.*

79. *Id.* at 2798 (citations omitted).

80. See Richard C. Reuben, *Brave New World*, CAL. LAW., Sept. 1993, at 31, for an interview with David M. Harney, representing the plaintiff attorney's perspective, and Raoul D. Kennedy, representing the views of defense attorneys.

admissibility of expert testimony, it is unlikely that *Daubert* will be of great consequence to most federal litigators.⁸¹ He adds that “expert practice will continue to focus on those characteristics that enhance or diminish the weight factfinders will give to an expert’s testimony rather than on indications that the testimony is so inherently flawed that it lacks sufficient reliability to be admitted.”⁸²

Critics of the *Daubert* decision have expressed concern that the decision will permit unqualified experts to unduly influence juries. Parties favoring the *Frye* rule question the ability of judges to decide the reliability of scientific evidence without more guidance.⁸³ They also fear that unreliable “expert” testimony will consume excessive amounts of time and money during litigation.

Most of these concerns are unfounded. The *Daubert* Court stressed that trial judges are still responsible for excluding expert testimony that is not trustworthy or may unduly prejudice the jury. The Court underscored that abandoning the *Frye* rule would not lead to a “free-for all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”⁸⁴

Additionally, the Court encouraged parties to seek summary judgment to avoid excessive loss of time and money. The Court responded to the defendants’ apprehension on this matter by confirming that “in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a

81. Quarles, *supra* note 15, at 19.

82. *Id.*

83. See Starrs, *supra* note 46, at 250:

Furthermore, not only might jury overreaction to scientific evidence be a cause for a special rule of admissibility, but judges too need guidance in the reception of scientific evidence. A distinct rule of admissibility for scientific evidence will restrain both judge and jury from according an undeserved hegemony to scientific evidence and will be an augury of and an incentive for uniformity among the court in the acceptance of the results of similar scientific analyses.

Id.

84. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2798 (1993).

judgment . . . and likewise to grant summary judgment."⁸⁵ Finally, the *Daubert* Court was confident that trial judges are qualified to evaluate the reliability of scientific evidence without a rigid "general acceptance" test.

Despite the potential for unreliable testimony, abolishing the *Frye* rule should result in more informed decisions. Juries should weigh expert evidence from both parties and decide which is more persuasive, rather than only hear from the side relying on the conventional scientific view. This approach promotes scientific development.

The *Daubert* standard may also increase the efficiency of litigation. A party relying on the "general acceptance" standard would have had to present cumulative evidence from various experts to show that a proffered theory prevailed in the scientific community. *Daubert* avoids this waste of judicial resources. Neither party is required to present redundant evidence in order to satisfy a rigid admission standard.

VI. CONCLUSION

"The new federal standard for the admission of expert testimony is a flexible test that emphasizes the trial court's gatekeeping role and abandons general acceptance as a prerequisite for the admission of scientific evidence."⁸⁶ *Daubert* gives the judge the discretion to decide the admissibility of expert testimony. This was the scheme originally envisioned by the Federal Rules of Evidence. Judges are still free to consider the factors initially expressed in *Frye*, but they are no longer required to do so.

Such a flexible system leaves the door open for reliable and helpful novel scientific techniques. Legal rules of evidence should not stifle scientific development. *Daubert* encourages novel scientific evidence, yet does not mandate the admission of unreliable and irrelevant evidence. Reliability checks still exist.

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85. *Id.* (citations omitted).

86. Quarles, *supra* note 15, at 16.