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Jones on Evidence: Civil and Criminal 7th ed.

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Civil and Criminal

7th Edition

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§ 44:1 Before Fed. R. Evid. 702: *Frye* and the "general acceptance" test

In the 1923 case *Frye v. U.S.*,[1] the United States Court of Appeals for the D.C. Circuit considered whether a scientist who had administered a "systolic blood pressure deception test" to the defendant could testify as an expert witness to explain to the jury how the "deception test"—an early form of a lie detector test—worked and to offer testimony regarding the significance of the defendant's "deception test" results. In affirming the trial court's exclusion of the expert's testimony regarding the primitive lie detector test and the test results, the D.C. Circuit determined that exclusion was appropriate because the method, i.e., the "deception test," was not generally accepted in the scientific community.

As the *Frye* court explained—in a two-page opinion uncluttered by footnotes[2]—when ruling on the admissibility of

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[Section 44:1]

[1]Frye v. U.S., 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923).

[2]Reasonable people can differ

expert testimony, there can be a "twilight zone" where courts must determine whether a particular "scientific principle or discovery" or method upon which an expert's deduction or testimony is based has crossed the line between the "experimental" and "demonstrable" stages.[3] That scientific principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[4]

Between 1923 and the enactment of the Federal Rules of Evidence in 1975, most federal and state courts used *Frye*'s "general acceptance" standard as the benchmark for admissibility of expert testimony. As discussed more fully in §§ 45:1 et seq., despite the passage of Fed. R. Evid. 702 in 1975 and the Supreme Court's decision in *Daubert* in 1993, the "general acceptance" standard has continued to survive for more than 90 years in numerous states because it is perceived as fostering judicial economy. This standard empowers courts to restrict or reject unfounded scientific evidence, thereby presumably reducing excess litigation and streamlining the judicial process.[5] Proponents of this standard often argue that it creates a limited pool of qualified experts in a particular field, which, theoretically, leads to a greater degree of

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as to whether these features of the opinion merit derision or admiration.

[3]Frye v. U.S., 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923).

[4]Frye v. U.S., 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923). The *Frye* court observed:

> "[W]hile courts will go a long way in admitting expert testimony deduced from a well-organized 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." Applying this standard, the court held that the lie detector or systolic blood pressure deception test had not reached "such standing and scientific recognition among physiological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." 293 F. 1013, 1014, 34 A.L.R. 145 (App. D.C. 1923).

[5]Reducing excess litigation became a political and public policy issue in the late 1980s. Former Vice President Quayle's Council on Competitiveness focused on stricter evidentiary standards as a method of ending excess litigation. Kaushal B. Majmudar, Daubert v. Merrel Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence, 7 Harv. J.L. & Tech. 187, 194–195 (1993).

But see Kenneth J. Chesebro, Galileo's Retort: Peter Huber's Junk Scholarship, 42 Am. U. L. Rev. 1637, 1687–1692 (1993) (arguing that the *Frye* test does not reduce excess litigation).

uniformity. The general acceptance standard also reduces the risk that a jury will be unduly influenced by a witness's credentials[6] and increases the probability that expert witness testimony is accurate and verdicts based thereon will be accurate as well.[7]

The general acceptance standard has very real limitations, however, which became a focal point of controversy following the enactment of the Federal Rules of Evidence.[8] In particular, the general acceptance standard prevents litigants from presenting novel scientific theories.[9] Although many novel scientific theories eventually are discredited, some ultimately become generally accepted.[10] Critics of the general acceptance standard maintain that it is inequitable, especially in cases of medical malpractice and toxic torts,[11] to force a plaintiff to delay legal action until the evidence on which his

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[6]While a jury may have ample expertise to weigh the presentation of basic evidence, most lay persons cannot comprehend many of the technical aspects of expert scientific testimony used in litigation. Andrew J. Lustigman, A New Look at Thermography's Place in the Courtroom: A Reconciliation of Conflicting Evidentiary Rules, 40 Am. U. L. Rev. 419, 445 (1990) (discussing a jury's ability to comprehend neurological and musculoskeletal disorders). Lustigman notes, for example, that "a jury presented with a graphic color photograph of the plaintiff's skin temperature purporting to show a positive injury will infer that it is objective proof regardless of its accuracy."

[7]Andrew J. Lustigman, A New Look at Thermography's Place in the Courtroom: A Reconciliation of Conflicting Evidentiary Rules, 40 Am. U. L. Rev. 419, 446 (1990) (arguing that if scientists do not agree with a particular technique, it should not be used in a courtroom to influence a trier of fact).

[8]Fed. R. Evid. 702 is discussed in §§ 40:8 to 40:11.

[9]U.S. v. Downing, 753 F.2d 1224, 1236–1237, 17 Fed. R. Evid. Serv. 1 (3d Cir. 1985) (discussing the inconsistent application of the *Frye* standard to determinations of whether novel theories were generally accepted); see U.S. v. Sample, 378 F. Supp. 44, 53 (E.D. Pa. 1974) ("[t]he *Frye* test of general acceptance in the scientific community precludes too much relevant evidence . . ."). One author argues that the restrictive standard of general acceptance is disadvantageous to toxic tort plaintiffs who are already faced with overcoming an entrenched defendant with substantial financial resources. Kaushal B. Majmudar, Daubert v. Merrel Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence, 7 Harv. J.L. & Tech. 187, 195 (1993).

[10]See Andrew J. Lustigman, A New Look at Thermography's Place in the Courtroom: A Reconciliation of Conflicting Evidentiary Rules, 40 Am. U. L. Rev. 419, 447 (1990) (noting that the general acceptance test fails to recognize the perpetual nature of scientific advancement).

[11]Many of these plaintiffs suf-

or her case is based becomes generally accepted by the scientific community.[12]

Frye is also discussed in §§ 43:2 to 43:3 and in greater detail throughout §§ 45:1 et seq.

§ 44:2 The enactment of Fed. R. Evid. 702 and the *Frye* "general acceptance" conflict

As originally enacted by Congress in 1975, Article VII of the Federal Rules of Evidence did not explicitly endorse or reject the *Frye* test. In its original language of enactment, Fed. R. Evid. 702 provided:

> If scientific, technical, or other 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.

Between 1975 and 1993, federal courts and courts in states that had an expert testimony rule modeled after Fed. R. Evid. 702 divided sharply as to whether Fed. R. Evid. 702 adopted the *Frye* "general acceptance" standard, or replaced it, and if so with what. Six circuits held that *Frye* was incorporated under Fed. R. Evid. 702.[1] Four other circuits

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fer from terminal illness, allegedly as a result of the wrongful act of the defendant(s). Requiring a particular kind of novel expert evidence to become generally accepted before it may be introduced in court has been criticized as unfair and inequitable. Kaushal B. Majmudar, Daubert v. Merrel Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence, 7 Harv. J.L. & Tech. 187, 195 (1993).

[12]Kaushal B. Majmudar, Daubert v. Merrel Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence, 7 Harv. J.L. & Tech. 187, 195 (1993).

As noted by Judge Brown, "[T]he *Frye* test was criticized because the newness of a scientific theory does not necessarily reflect its unreliability, "nose counting" of the scientific community could be difficult and unhelpful, and the standard delays the admissibility of new evidence simply because the scientific community has not had adequate time to accept the new theory." Harvey Brown, Eight Gates for Expert Witnesses, 36 Hous. L. Rev. 743, 779 (1999).

[Section 44:2]

[1]Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 33 Fed. R. Evid. Serv. 1173 (5th Cir. 1991) (abrogated by, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993)); U.S. v. Metzger,

held that Fed. R. Evid. 702 pre-empted *Frye*.[2]

The Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] which defined the trial judge as the "gatekeeper" for admission of expert testimony and provided a much more detailed framework for determining admissibility of the same, had a substantive impact on federal and state courts' application of Fed. R. Evid. 702. As discussed below, the *Daubert* decision ultimately led to a substantive amendment of Fed. R. Evid. 702.

Results of research conducted well over a decade after *Daubert* was decided and close to a decade after Fed. R. Evid. 702 was amended (to incorporate *Daubert's* standard) supports some commentator arguments that "the choice between a *Frye* and *Daubert* standard does not make any practical difference" in the context of civil litigation.[4] But, as discussed more fully in §§ 52:1 et seq., *Daubert* arguably has played a role in tort reform, because it requires judges—faced with tort cases in which expert testimony and presentation of scientific evidence to a jury often play a critical role—to scrutinize scientific evidence more closely.[5] Thus, some post-*Daubert* case statistics lead researchers to conclude that

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778 F.2d 1195, 19 Fed. R. Evid. Serv. 695 (6th Cir. 1985); U.S. v. Smith, 869 F.2d 348, 27 Fed. R. Evid. Serv. 938 (7th Cir. 1989); U.S. v. Solomon, 753 F.2d 1522, 17 Fed. R. Evid. Serv. 779 (9th Cir. 1985); U.S. v. Shorter, 809 F.2d 54, 87-1 U.S. Tax Cas. (CCH) ¶ 9127, 22 Fed. R. Evid. Serv. 537, 59 A.F.T. R.2d 87-449 (D.C. Cir. 1987) (abrogated by, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993)).

[2]U.S. v. Baller, 519 F.2d 463 (4th Cir. 1975); U.S. v. Bennett, 539 F.2d 45 (10th Cir. 1976); U.S. v. Downing, 753 F.2d 1224, 17 Fed. R. Evid. Serv. 1 (3d Cir. 1985); U.S. v. Jakobetz, 955 F.2d 786, 34 Fed. R. Evid. Serv. 876 (2d Cir. 1992).

[3]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993).

[4]Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 472–73 (2005).

[5]Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 472–73 (2005), citing Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision xv (2001) (reporting that after Daubert, "[federal] judges scrutinized reliability more carefully and applied stricter

Daubert's effects in civil litigation have been pro-defendant, empowering "defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment."[6]

§ 44:3 Fed. R. Evid. 702, Fed. R. Evid. 703, and the *Daubert* trial court

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] two minor children and their families alleged that defendant Merrell Dow's product, Bendectin, when used by the mothers during pregnancy, caused severe limb reduction in each child.[2] Prior to trial, Merrell Dow moved for summary judgment on the basis that the plaintiffs could not show that the Bendectin did, in fact, cause the birth defects. The plaintiffs opposed the motion with testimony by eight experts based on "in vitro" and "in vivo" studies, pharmacological studies, and a "reanalysis" of previously published epidemiological studies.

In assessing the admissibility of this evidence pursuant to the Federal Rules of Evidence, the trial court focused on Fed. R. Evid. 703, which at the time provided:

> ***Rule 703: Bases of Opinion Testimony by Experts.***
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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

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standards in deciding whether to admit expert evidence"); Carol Krafka et al., Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials, 8 Psychol., Pub. Pol'y & L. 309, 330–31 (2002) (reporting results from judge and attorney surveys that suggest greater scrutiny of scientific evidence in the wake of Daubert).

[6]Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 472–73 (2005).

[Section 44:3]

[1]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) ¶ 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993).

[2]Limb reduction occurs when the child is born without fully developed fingers, toes, and arms.

evidence.[3]

The *Daubert* trial court read Fed. R. Evid. 703 in a restrictive manner and, consistent with *Frye*, it held that scientific evidence—to be admissible—has to be generally accepted by experts in the field. The court determined that plaintiffs' experts' testimony failed to satisfy this test, because the testimony was based on studies that had not been published nor been subject to peer review and therefore were not generally accepted. The trial court restrictively held that any evidence other than an epidemiological study was not relevant, and that the plaintiffs' experts' "reanalysis" was inadmissible because "it had not been published or subjected to peer review."[4] Having held plaintiffs' evidence inadmissible, because it was not of a kind generally accepted in the scientific community, the court granted defendant Merrell Dow's motion for summary judgment.[5]

The Ninth Circuit affirmed, ruling that the *Frye* decision meant that "expert opinion based on a technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community."[6] The Ninth Circuit agreed with the trial court that the fact that the "reanalysis" had not been published prevented that evidence from passing the *Frye* test. But, as discussed in detail in the following sections, the Supreme Court reversed the Ninth Circuit and issued its landmark *Daubert* decision, which remains the

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[3]The rule has since been amended. See § 40:12.

[4]Daubert, 727 F. Supp. at 575.

[5]Daubert v. Merrell Dow Pharmaceuticals, Inc., 727 F. Supp. 570, 29 Fed. R. Evid. Serv. 749 (S.D. Cal. 1989), aff'd, 951 F.2d 1128, Prod. Liab. Rep. (CCH) ¶ 13014, 34 Fed. R. Evid. Serv. 1145 (9th Cir. 1991), judgment vacated, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) ¶ 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993) and aff'd, 43 F.3d 1311, Prod. Liab. Rep. (CCH) ¶ 14094, 40 Fed. R. Evid. Serv. 1236, 25 Envtl. L. Rep. 20856 (9th Cir. 1995).

[6]Daubert v. Merrell Dow Pharmaceuticals, Inc., 727 F. Supp. 570, 29 Fed. R. Evid. Serv. 749 (S.D. Cal. 1989), aff'd, 951 F.2d 1128, 1129–1130, Prod. Liab. Rep. (CCH) ¶ 13014, 34 Fed. R. Evid. Serv. 1145 (9th Cir. 1991), judgment vacated, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) ¶ 13494, 37 Fed. R. Evid. Serv. 1, 23 Envtl. L. Rep. 20979 (1993) and aff'd, 43 F.3d 1311, Prod. Liab. Rep. (CCH) P 14094, 40 Fed. R. Evid. Serv. 1236, 25 Envtl. L. Rep. 20856 (9th Cir. 1995).