


# *FRYE*'D BY ADMISSIBILITY STANDARDS:

DOES THE STANDARD OF ADMISSIBILITY IN STATE COURT  
MAKE ANY DIFFERENCE IN PRACTICE?

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Expert testimony frequently plays a dispositive role in mass tort and complex product liability cases, and the applicable standard used to determine whether such key evidence is admissible in state court can vary across state lines. The two principal standards of admissibility, *Daubert* and *Frye*, have been the subject of innumerable commentaries and articles, with some debating the relative pros and cons, including which standard is stricter;<sup>1</sup> others advocating for particular states to either keep or modify *Frye* or adopt *Daubert*;<sup>2</sup> and still others hypothesizing, as did at least one article previously featured in this publication, that the difference between *Daubert* and *Frye* does indeed make a difference in practice. While providing background on both standards, this article focuses on the primary differences between the two and presents the prevalent views on whether which standard a state applies *really* makes any difference in the way scientific evidence is handled in practice.

### **BACKGROUND: *FRYE* AND *DAUBERT***

In 1923, the “general acceptance” standard for the admissibility of scientific evidence was set in *Frye v. United States*. *Frye* involved a murder trial where the defendant unsuccessfully sought to introduce expert testimony regarding a lie detector test based on changes in systolic blood pressure. In upholding the exclusion of such evidence, the D.C. Circuit noted that the test had not gained “standing and scientific recognition among physiological and psychological authorities” and thus had not gained “general acceptance in the particular field in which it belongs.”<sup>3</sup>

*Frye* was not often cited until years later—and not regularly until the 1970s—and even then it was applied primarily in criminal cases.<sup>4</sup> It was not applied in a federal civil case until 1984.<sup>5</sup> But as more federal courts and most state courts adopted or applied *Frye*, confusion arose about whether *Frye* was superseded by the enactment of the Federal Rules of Evidence in 1975. Absent from the text of then Rule 702, of course, was any reference to “general acceptance.”

The Supreme Court addressed this very issue in 1993 when it decided *Daubert v. Merrell Dow Pharmaceuticals*.<sup>6</sup> In *Daubert*, the Court determined that trial judges must not only ascertain the “general acceptance” of expert testimony, but also ensure that such testimony is “relevant to the task at hand” and “rests on a reliable foundation.”<sup>7</sup> The Court further enumerated four nonbinding factors courts could consider in evaluating the admissibility of expert testimony: (1) whether such evidence was generally accepted by the relevant scientific community; (2) whether the methodology was published and subject to peer review; (3) whether the methodology has a known or potential rate of error; and (4) whether the results are testable.<sup>8</sup> *Daubert* was further refined by *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending *Daubert*’s general holding to include nonscientific, or technical, expert testimony), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (finding that determinations regarding admissibility of expert testimony were to be reviewed for abuse of discretion). These three cases, referred to as the “*Daubert* trilogy,” are the law in federal court.

Today, the majority of states have adopted *Daubert*, if not in name, then in ways that are nearly identical doctrinally. However, within these so-called *Daubert* states, there is some variation. Some states have adopted the entire “trilogy,” while some have adopted only certain elements of the “trilogy.” And still others, like New Jersey, have adopted *Daubert*, but only in certain types of cases or circumstances. A close look at the *Frye* states shows similar nonuniformity. Kansas, for example, will apply *Frye*, but only to new or developing science;<sup>9</sup> Illinois does not apply *Frye* to expert medical testimony.<sup>10</sup> In addition to Kansas and Illinois, at least 10 other jurisdictions have retained *Frye* (in one form or another).<sup>11</sup>

### THE PRINCIPAL DISTINCTIONS BETWEEN *FRYE* AND *DAUBERT*

Beyond the fact that each represents a distinct standard of admissibility, there are two principal distinctions between jurisdictions that apply *Frye* and those that apply *Daubert*—the first concerns which body (the judiciary or the scientific community) makes the call on the science, and the second concerns the evidence to which these standards apply. As to the first, under *Frye*, trial judges are ostensibly charged with assessing whether such testimony is “generally accepted” in the relevant scientific community. In *Daubert* jurisdictions, on the other hand, trial judges in their “gatekeeper” role must assess the reliability of any expert evidence.<sup>12</sup>

As to the second, in those jurisdictions that follow *Kumho* (or some variation thereof), *Daubert* extends to all types of expert testimony, whereas in many *Frye* jurisdictions, challenges to expert testimony are typically limited to scientific testimony only, excluding other types of expert testimony, such as expert medical testimony.<sup>13</sup> Like the states noted above, California also significantly restricts the application of its version of *Frye*—so much so that “there are no reported California cases applying [*Frye*] to cancer causation and the like.”<sup>14</sup>

### DOES *FRYE* OR *DAUBERT* MAKE ANY DIFFERENCE IN STATE COURT? THREE VIEWS

The distinctions between *Daubert* and *Frye* logically suggest that the adoption of one or the other should make some difference in practice. Recently, however, some commentators have suggested that whether a state applies *Daubert* or *Frye* makes no *real* difference in how those courts assess the admissibility of expert testimony. One of the leading treatises on scientific evidence, for instance, articulates this notion in the following way: “[R]elatively few toxic tort case admissibility rulings actually turn on the difference between *Daubert* and *Frye*. *Daubert*’s shadow now casts itself over state court opinions even in jurisdictions that have not formally adopted the *Daubert* test.”<sup>15</sup> Likewise, some recent studies support the proposition that whether a state adopts *Daubert* or *Frye* makes no difference in tort cases. Of course, these are not the only views on this subject, but thoughts about what, if any, difference a state’s choice of *Daubert* or *Frye* makes can largely be grouped into the three categories that follow.

***Daubert* Is More Liberal Than *Frye*.** Initially, after *Daubert* was decided, many commentators focused on whether it was a more lenient or liberal standard—one, in particular, that would make it more difficult to challenge expert testimony. Even the Court in *Daubert* noted that it was imposing a more liberal standard than *Frye*. In fact, the Court stated that *Frye* was “at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion testimony.’ ”<sup>16</sup> Soon after *Daubert*—as opposed to more recent scholarship—some even speculated that *Daubert* was pro-plaintiff<sup>17</sup> and would ultimately make it easier for plaintiffs to admit expert testimony and therefore avoid potentially dispositive motions practice.<sup>18</sup>

***Daubert* Is Stricter Than *Frye*.** In stark contrast to early reports that *Daubert* could be more liberal than *Frye*, one

survey of post-*Daubert* product liability decisions revealed that two-thirds excluded expert testimony.<sup>19</sup> Other data showed that parties—and especially civil defendants—were hardly shy about filing *Daubert* motions. In the six years post-*Daubert*, the number of federal-court orders issuing rulings in civil cases that addressed the admissibility of expert testimony was 36 times greater than in the previous six-year period,<sup>20</sup> and these motions were successful nearly 70 percent of the time.<sup>21</sup>

Recently, plaintiffs' advocacy groups, apparently accepting the notion that *Daubert* is anything but a more liberal standard and is, instead, far stricter than *Frye*, have advocated against the adoption of *Daubert* in state courts. Scholarship, too, has referred to *Daubert* as "intolerable" for plaintiffs: "Plaintiffs have, in large part, been stymied by their inability to establish that toxic agents, no matter how potentially dangerous, were actually responsible for the harms they have suffered. Their difficulties in this regard have increased exponentially since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*"<sup>22</sup>

**The Standard of Admissibility Does Not Matter.** Although the adoption of *Daubert* or *Frye* is viewed by many as having some impact on the outcome of admissibility determinations, other commentators increasingly question the assumption that the application of one standard over the other may have practical significance. Some suggest that the primary benefit of *Daubert* was not that it was a stricter standard or created a higher hurdle to admissibility, but that it heightened trial courts' awareness of the problem of admitting unreliable science—and thus, whether a *Daubert* or *Frye* jurisdiction, the results are often the same.<sup>23</sup> One survey found that state-court judges considered the "general acceptance" prong to be the most useful of the *Daubert* factors and that, while *Daubert* may have increased judicial scrutiny of the admissibility of expert testimony, these courts were generally applying the same analysis regardless of what standard actually applied in the respective jurisdictions.<sup>24</sup> Other studies have yielded similar results. In one, which involved analyzing hundreds of federal and state criminal appellate decisions, researchers found that *Daubert*—whether in federal or state court—had no statistically significant effect on the rates of admissibility of expert testimony.<sup>25</sup> While this latter study looked only at criminal cases, thereby making it difficult to extrapolate to the civil

context, its findings nonetheless contribute to the growing suspicion that the standard of admissibility a state adopts does not matter from a practical standpoint.

## CONCLUSION

Expert testimony can ignite or snuff out a mass tort or complex product liability case. And while the commentaries and articles examining the relative merits of the standards of admissibility for such evidence—*Daubert* and *Frye*—are legion, there are varying views on whether the application of one standard over another really makes any difference in practice. For litigants, this means one should not lose hope if stuck in a *Frye* jurisdiction. And, regardless of jurisdiction, both *Daubert* and *Frye*, if rigorously applied, have the potential to be powerful tools in limiting or excluding an opponent's experts. ■

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<sup>1</sup> See, e.g., Erica Beecher-Monas, "Blinded by Science: How Judges Avoid the Science in Scientific Evidence," 71 *Temple Law Review* 55, 75–76 (1998).

<sup>2</sup> See, e.g., Mary Gaston, "State v. Gentry: The Washington Supreme Court Opens the Door for Unreliable Scientific Evidence," 31 *Gonzaga Law Review* 475, 498–99 (1996); Penelope Harley, "Minnesota Decides: *Goeb v. Tharalson* and the Admissibility of Novel Scientific Evidence," 24 *Hamline Law Review* 460, 463 (2001).

<sup>3</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>4</sup> See Faigman, Porter & Saks, "Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence," 15 *Cardozo Law Review* 1799, 1808 n.25 (1994).

<sup>5</sup> See Paul C. Giannelli, "Junk Science: The Criminal Cases," 84 *Journal of Criminal Law & Criminology* 105, 111 (1993).

<sup>6</sup> 509 U.S. 579 (1993). The *Daubert* Court expressly held that *Frye* was superseded by Federal Rule of Evidence 702. See *id.* at 587.

<sup>7</sup> *Id.* at 584–87.

<sup>8</sup> *Id.* at 594.

<sup>9</sup> See *State v. McHenry*, 136 P.3d 964 (Kan. App. 2006).

<sup>10</sup> See *Warstalski v. JSB Const. & Consulting Co.*, 892 N.E.2d 122 (Ill. App. 2008).

## CONCLUSION

The importance of advance and thorough preparation for addressing an aviation crisis cannot be overstated, as it will help a company deal with adversity if and when the real event occurs. Corporate executives and their in-house teams should not face such an extraordinarily stressful event alone or unprepared; there are many resources available to help put together an effective crisis management plan. Thought and deliberate action must be taken in implementing it, however, since good intentions alone will not suffice. Don't be caught unprepared. ■

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<sup>11</sup> See generally, e.g., Clifton T. Hutchinson, "Daubert in State Courts," 9 *Kansas Journal of Law & Public Policy* 15 (1999).

<sup>12</sup> *Daubert*, 509 U.S. at 592–93.

<sup>13</sup> See Samuel J. McNaughton, "What is Good Science?" 13 *Natural Resources & Environment* 513, 518 (1999).

<sup>14</sup> Kennedy & Martin, *California Expert Witness Guide* § 4.15, at 56 (2d ed. 1999).

<sup>15</sup> David Faigman et al., *Modern Scientific Evidence* § 35-1.3, at 150–51 (2d ed. 2002).

<sup>16</sup> *Daubert*, 509 U.S. at 588.

<sup>17</sup> Paul M. Barrett, "Justices Rule Against Business in Evidence Case—Restrictive Standard for Use of Scientific Testimony in Trials Is Struck Down," *Wall Street Journal*, June 29, 1993, at A3.

<sup>18</sup> See C. Robert Showalter, "Distinguishing Science From Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era," 2 *Virginia Journal of Social Policy & the Law* 211, 219 (1995) ("Legal commentators generally view ... *Daubert* as a 'plaintiff's victory' "); see also generally *Joiner*, 522 U.S. at 142 ("[T]he Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*.").

<sup>19</sup> See Jonathan Hoffman, "A Briefcase and an Opinion: Post-Daubert Expert Testimony—A Major Shift," *Product Safety & Liability Reporter* 379 (Apr. 8, 1994).

<sup>20</sup> See D. Michael Risinger, "Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?" 64 *Albany Law Review* 99, 104 (2000).

<sup>21</sup> See *id.* at 108.

<sup>22</sup> Berger & Twerski, "Uncertainty and Informed Choice: Unmasking *Daubert*," 104 *Michigan Law Review* 257, 258, 288 (2005).

<sup>23</sup> See also Paul C. Giannelli, "Admissibility of Scientific Evidence," 28 *Oklahoma City University Law Review* 1, 11 (2003) (finding that *Daubert* has "crept into the *Frye* lexicon").

<sup>24</sup> See Sophia I. Gatowski et al., "Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World," 25 *Law and Human Behavior* 433, 444–48, 452–53 (2001).

<sup>25</sup> See Jennifer L. Groscup et al., "The Effects of *Daubert* on the Admissibility of Expert Testimony in State and Federal Criminal Cases," 8 *Psychology, Public Policy, and Law* 339, 342, 344 (2002).