THE TRIAL JUDGE AS GATEKEEPER FOR SCIENTIFIC EVIDENCE: WILL OHIO RULE OF EVIDENCE 102 FRUSTRATE THE OHIO COURTS' ROLE UNDER DAUBERT V. MERRELL DOW?

by

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INTRODUCTION

One of the disquieting, yet exciting, components of modem life is the remarkable speed at which scientific knowledge, once thought unquestionable, is shown to be dubious or uncertain. In one-tenth of a lifetime, we can see both the creation of new scientific disciplines and the dismantling of scientific principles long held to be immutable.

Along with its volatility, scientific development offers staggering promise: DNA screening, the product of computer-assisted research into the human genetic structure, has the potential of freeing persons wrongly convicted of heinous crimes and securing just convictions of those guilty of the same.[1] Where before, courts would not be in a position to bring a case to judgment on the merits for want of evidence of causation, scientific collaborations have led to the creation of new theories of tort liability, which allow the proper judicial allocation of societal costs.[2] We have witnessed the patenting of life forms and can predict the rapid growth of bio-technology and the infinite complexities likely to accompany such growth.[3]

Ours is a society that insists that our courts be capable participants in the development of these scientific advances (or retreats, as the case may be). Science and the judicial process, however, can be strange bedfellows, and the modem trial court may be ill-equipped to provide an adequate and fair forum for the application of novel scientific theories to the facts and circumstances of cases brought before it.

This article considers the role of the trial court in responding to the changes wrought by scientific innovation. Particular consideration is given to the impact likely to be

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[1] Brad R. Byers, Comment, *DNA Fingerprinting and the Criminal Defendant: Guilty or Innocent? Only His Molecular Biologist Knows for Sure*, 16 OHIO N.U. L. REV. 57 (1989); CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, & GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING – CREATING OPPORTUNITIES AND MEETING CHALLENGES 43 (1993).

[2] Kimberly M. Skaggs, Note, *Limiting the Admissibility of Expert Testimony: Christopherson v. Allied-Signal Corp.*, 53 OHIO ST. L.J. 1185 (1992).

[3] John H. Barton, *Patenting Life: Entrepreneurs, Courts and Biotechnology Patents*, 264 SCI. AM. 40 (1991).

realized in Ohio trial courts from the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] In *Daubert*, the Court laid to rest the longstanding requirement from *Frye v. United States*,[5] that for expert scientific testimony to be admissible, the principles upon which such testimony is based must have achieved "general acceptance" within the relevant scientific community.[6] In the Federal forum, the Court supplanted the "austere" *Frye*[7] test with Federal Evidence Rule 702,[8] which allows scientific opinion evidence that will "assist the trier of fact to understand the evidence or to determine a fact in issue [by] a witness qualified as an expert by knowledge, skill, experience, training, or education. . . ."[9]

In *Daubert*, the Court enhances the trial court's gatekeeper role in entertaining novel scientific theories: No longer may a court end its inquiry after obtaining an answer to the question posed in *Frye*, whether the scientific testimony is based upon principles which have achieved "general acceptance" within the relevant scientific community.[10] While "general acceptance" continues to be one element in the court's inquiry,[11] the trial court's task now must include determining whether the testimony is at least minimally reliable and whether the testimony fits the facts.[12] Only "valid" evidence is admissible under Federal Evidence Rule 702,[13] and "validity" in turn depends upon a test composed of at least the following five factors, denominated as the Court's "general observations:"[14] (1) whether the knowledge "can be (and has been) tested;"[15] (2) whether the theory or technique "has been subjected to peer review and publication;"[16] (3) "the known or potential rate of error;"[17] (4) in the case of a particular scientific technique, "the existence

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[4] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

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

[6] *Daubert*, 113 S.Ct. at 2799.

[7] *Id.* at 2794.

[8] FED. R. EVID. 702, as enacted by Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (1988)).

[9] *Daubert*, 113 S.Ct. at 2794 (quoting Fed. R. Evid. 702). Note that *Daubert* is limited to proffers of "scientific" evidence only; the Court states that while Fed. R. Evid. 702 applies to "technical or other specialized knowledge," the discussion in *Daubert* is "limited to the scientific context because that is the nature of the expertise offered here." *Id.* at 2795 n.8.

[10] *Id.* at 2794.

[11] *Id.* at 2797.

[12] *Id.* at 2796-97.

[13] "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. [Footnote omitted] Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of those principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 2797.

[14] *Id.* at 2796.

[15] *Id.*

[16] *Id.* at 2797.

[17] *Id.*

and maintenance of standards controlling the technique;"[18] and (5) the "general acceptance" or lack thereof in the scientific community.[19]

Typically, such an enumeration would be welcomed by courts and parties alike as it offers guidance regarding what does or does not meet the burdens imposed by the Rule. In Ohio, however, the course charted by *Daubert* may be obscured by fundamental differences between the Ohio Rules of Evidence and the Federal Rules of Evidence. While Ohio Evidence Rule 702 and Federal Evidence Rule 702 are identical, Ohio Evidence Rule 102 provides that the rules of evidence "shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended."[20] In contrast, Federal Evidence Rule 102 provides that the Rules of Evidence shall be construed to promote ". . .growth and development of the law of evidence. . . ."[21] In fact, in *Daubert,* the Court stated that under the Federal Rules, no common law remains, although the common law "nevertheless could serve as an aid to their application."[22]

In order to appreciate the significance of Ohio Evidence Rule102 in this context, it is helpful to first examine some of the events leading to *Daubert*, especially the application (and in some instances, the rejection) of *Frye* both in Ohio and at the federal level. Following that, this article will examine the rationale of *Daubert* as it might apply in Ohio given the limitations of Ohio Evidence Rule 102. Last, the recommendation is made that this is an opportune time to align Ohio Evidence Rule 102 with Federal Evidence Rule 102, and to supplement the Ohio Rules of Evidence to expressly invest the trial court with broad authority to appoint expert scientific witnesses in the manner already permitted in Federal Evidence Rule 706.[23]

The Trial Court's Burden Under Daubert

Daubert was a toxic tort case involving the drug Bendectin, once widely prescribed to combat morning sickness during pregnancy.[24] The plaintiffs were children born with severely malformed limbs, which they alleged had been caused by their mothers' use of the drug.[25] The case was originally filed in a California state court and removed on

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[18] *Id.*

[19] *Id.; see generally* Daniel J. Capra, *Decision Unlikely to Have Real Impact on State or Federal Toxic Tort Litigation*, 21 Prod. Safety & Liab. Rep. (BNA) 22 (Summer/Fall 1993).

[20] OHIO R. EVID. 102 (effective July 1, 1980).

[21] FED. R. EVID. 102.

[22] *Daubert*, 113 S.Ct. at 2794 (citing United States v. Abel, 469 U.S. 45, 51-52 (1984)).

[23] Both authors expressly state that while they are, respectively, a hearing officer and an assistant attorney general, neither are presenting the views of their respective offices; rather, the views stated here are theirs alone, and do not necessarily reflect the views of either the Ohio Environmental Protection Agency or the Ohio Attorney General.

[24] Bert Black, *Scientific Evidence after Daubert: Are the Frye Wars Over?*, 1993 A.B.A. Bus. L. Sec. Symposium *Judicial Control of Scientific Evidence: The Implications of Daubert*, 4 (August 9, 1993).

[25] *Daubert*, 113 S.Ct. at 2791.

diversity grounds to federal district court.[26] In a motion for summary judgment, Merrell Dow offered the affidavit of a well-credentialed expert regarding the risks from exposure to various chemical substances.[27] The expert had conducted a review of published studies concerning Bendectin and the risk that it might be a substance capable of causing malformations in fetuses.[28] Based on the expert's review of more than thirty published studies, the expert concluded that Bendectin had not been shown to be a risk factor for human birth defects.[29] The plaintiffs responded with expert testimony of their own, which included conclusions that Bendectin can cause birth defects.[30] These conclusions were based upon animal studies, studies of the chemical structure of Bendectin, and "reanalysis" of previously published human statistical studies.[31]

The trial court granted defendant drug manufacturer's motion for summary judgment after finding that the plaintiffs' expert testimony on causation lacked an adequate scientific basis.[32] After the Court of Appeals for the Ninth Circuit affirmed,[33] the United States Supreme Court granted certiorari.[34]

The Supreme Court noted the "sharp divisions among the courts regarding the proper standard for the admission of expert testimony"[35] and in particular limits on the admissibility of purportedly scientific evidence.[36] The district court had granted summary judgment for defendant Merrell Dow after finding that scientific evidence is admissible only if the principle upon which it is based is "'sufficiently established to have general acceptance in the field to which it belongs.'"[37] The court of appeals affirmed, citing *Frye v. United States*[38] for the proposition that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.[39]

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[26] *Daubert*, 113 S.Ct. at 2786.

[27] *Id.* at 2790.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 2791-92.

[32] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 727 F.Supp. 570, 576 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated*, 113 S.Ct. 2786 (1993); *see also* Black, *supra* note 24, at 4.

[33] Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (9th Cir. 1991), *vacated*, 113 S.Ct. 2786 (1993).

[34] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 320 (1992).

[35] *Daubert*, 113 S.Ct. at 2792.

[36] *Id.* at 2792-93.

[37] Daubert v. Merrell Dow Pharmacueticals, Inc., 727 F.Supp. 570, 572 (S.D. Cal. 1989) (quoting United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978)), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated*, 113 S.Ct. 2786 (1993).

[38] 293 F. 1013, 1014 (D.C. Cir. 1923).

[39] Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1129-30 (9th Cir. 1991), *vacated*, 113 S.Ct. 2786 (1993).

The technique in question was the plaintiffs' reliance upon unpublished "reanalysis" of previously published human statistical studies.[40] In affirming the district court's decision, the court of appeals held that reanalysis is generally accepted by the scientific community *only* when it is subjected to verification and scrutiny by others in the field.[41] The court concluded that the petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.[42]

The focus of the Supreme Court's review was the "reasoning or methodology" by which plaintiffs' experts reached their conclusion as to causation,[43] and the trial court's role in weighing the same:

> Faced with the proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[44]

This role is described not by *Frye* but by Federal Evidence Rule 702 which "clearly contemplates some degree of regulation of the subject and theories about which an expert may testify. '*If scientific*, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue' an expert 'may testify *thereto*. . . .'"[45] *Frye*, on the other hand, limited the judicial role to an inquiry of whether "the thing from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field in which it belongs."[46] Under *Frye*, "general acceptance" is the "exclusive test for admitting expert scientific testimony," and the high court found this test to be "absent from, and incompatible with, the Federal Rules of Evidence," and held it should not be applied in federal trials.[47]

The Supreme Court found that the *Frye* test had been superseded by the legislatively enacted Federal Evidence Rule 702.[48] The *Frye* test arose in a case "concerning the

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[40] *Daubert*, 113 S.Ct. at 2791-92.

[41] *Daubert*, 951 F.2d at 1131.

[42] *Daubert*, 113 S.Ct. at 2792.

[43] *Id.* at 2796.

[44] *Id.* (footnotes omitted).

[45] *Id.* (quoting FED. R. EVID. 702).

[46] *Daubert*, 113 S.Ct. at 2793 (quoting Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923)).

[47] *Id.* at 2794.

[48] *Id.* at 2793.

admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine.'"[49] The test was quoted in *Daubert*:

> 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 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.*[50]

The Supreme Court noted that, in *Frye*, the results of the systolic blood pressure deception test were ruled inadmissible because the test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. . . ."[51] The *Frye* test became the dominant component of the law of expert testimony, and it inspired its share of academic debate.[52] It had also made its way into Ohio common law prior to the effective date of the Ohio Rules of Evidence.[53]

The Court in *Daubert* found that the enactment of Federal Rule of Evidence 702 called for a review broader than that called for in the *Frye* test and changed the role of the trial court, enhancing its "gatekeeper" function in this respect. Judge Reavley of the United States Court of Appeals for the Fifth Circuit has described *Daubert's* likely impact on courts this way:

> Judges who are solicitous of the jury's role as fact-finder, with the aid of cross-examination and opposing experts under the adversary system, will find reassurance in *Daubert*. Beside freeing them from *Frye*, the *Daubert* court repeatedly stresses that the Federal Rules of Evidence mandate liberal admissibility and full use of the adversary system to resolve factual disputes.
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[49] *Id.*

[50] *Id.* (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

[51] *Id.* (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

[52] *See id.* at 2793 n. 4. ("Indeed, debates over *Frye* are such a well-established part of the academic landscape that a distinct term—'Frye-ologist'—has been advanced to describe those who take part.").

[53] *See, e.g.*, State v. Olderman, 336 N.E.2d 442, 447-48 (Ohio Ct. App. 1975) (voiceprint exemplars as the spectrographic analysis of an accused's voice are, when properly qualified by expert witnesses and other evidence as to their acceptance in the scientific community, admissible in a criminal trial) (citing *Frye* as the "standard of admissibility of scientific evidence such as voice exemplars")). *See also* State v. Williams, No. CA-1999, 1982 WL 2940 (Ohio Ct. App. Feb. 18, 1982).

> While the *Daubert* majority recognized that judges have gatekeeping responsibility to ensure evidentiary reliability, nothing in *Daubert* requires any new encroachment on the jury's role as factfinder. . . .
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> The judge's role, according to *Daubert*, entails a thorough review of expert testimony to ensure that the expert reached her conclusions through the scientific method of hypothesis and testing. Opposing experts may effectively assist the judge in identifying where challenged expert testimony departs from the scientific method. After fully understanding the testimony, the judge may exclude it after finding the expert supports her conclusions with inadequate testing, flawed logic, or excessive speculation. Such testimony would be considered as not based on scientific knowledge and, under Rule 702, would not get to a jury.[54]

Under *Daubert*, then, Federal Rule of Evidence 702 does not follow the common law as espoused in *Frye*, as the Rule required more than just a determination of "general acceptance" of a methodology. Indeed, *Daubert* calls for the trial court to exercise a greater degree of regulation of the subjects and theories about which a scientific expert may testify than that required by *Frye*.[55]

Under *Daubert*, the trial court now engages in a two-part analysis, focusing first on whether the proffer entails "scientific knowledge" and second on whether the knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ."[56] Thus, the subject proffered must be "scientific [which] implies a grounding in the methods and procedures in science;"[57] the word "'knowledge'. . . applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."[58]

Next, in order for the testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue," it must be relevant, and in this context it must relate to an issue in the case.[59] The testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."[60]

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[54] Thomas Reavley, *Daubert May Be Read To Allow Broad Judicial Control In Evaluating Reliability*, 21 Prod. Safety & Liab. Rep., (BNA) No. 30, part II at 20 (Summer/Fall 1993).

[55] *Daubert*, 113 S.Ct. at 2794.

[56] *Id.* at 2795.

[57] *Id.*

[58] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986)).

[59] *Id.* (citing 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVINDENCE ¶ 702[02], at 702-18(1988)).

[60] *Id.* at 2795-96 (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

Unlike the testimony of the ordinary witness[61], the expert's testimony need not be based upon first hand knowledge.[62] As interpreted in *Daubert,*

> [A]n expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of first-hand knowledge— a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" Advisory Committee's Notes on Fed. Rule Evid. 603 (citation omitted) — is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.[63]

According to *Daubert,* then, the trial judge, when faced with expert scientific testimony, must determine whether the expert is proposing to testify to scientific knowledge and whether the knowledge will assist the trier of fact to understand or to determine an issue. This in turn anticipates "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied appropriately to the facts in issue."[64]

"[A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested."[65] This consideration relates to the notion that today's scientific methodology calls for generating hypotheses which are amenable to testing and falsification.[66] Another pertinent consideration is whether the theory or technique has been subject to peer review and publication. This process of peer review and publication was absent in the methodology employed by the expert witnesses for the plaintiffs in Daubert and this absence led the court of appeals, when it applied the *Frye* test, to reject the "reanalysis" relied upon to show that Bendectin could have caused the plaintiffs' birth defects.[67] Now,

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[61] *See* FED. R. EVID. 701.

[62] *Daubert,* 113 S.Ct. at 2796. *But cf.* FED. R. EVID. 703, which permits the expert to base an opinion upon (1) facts or data perceived by the expert, (2) facts or data made known to the expert at the hearing, or (3) facts or data made known to the expert before the hearing; *with* OHIO R. EVID. 703, which recognizes only the first two bases. *See also* OHIO R. EVID. 703, Staff Note (which also notes that in Ohio "the hypothesis upon which an expert witness is asked to state his opinion must be based upon facts within the personal knowledge of the witness or upon facts shown by other evidence." (citing Burens v. Industrial Comm., 124 N.E.2d 724 (Ohio 1955); Kraner v. Coastal Tank Lines, 269 N.E.2d 43 (Ohio 1971)).

[63] *Daubert,* 113 S.Ct. at 2796.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 2792 (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1131 (9th Cir. 1991), *vacated,* 113 S.Ct. 2786 (1993)).

peer review and publication are but two of several factors relevant under *Daubert*.[68] Additional considerations for the trial court are the "known or potential rate of error" and "the existence and maintenance of standards controlling the technique's operation."[69]

As it was in *Frye*, "general acceptance" is still important; however, it is no longer the sole inquiry. As the trial court conducts its inquiry into the "reliability"[70] of a given scientific technique, that assessment "does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."[71] "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community' may properly be viewed with skepticism."[72]

In his dissent to Part II-B of *Daubert*, Chief Justice Rehnquist cautions against the majority's "general observations,"[73] warning that by proceeding to construe Federal Evidence Rules 702 and 703 (after the issue became, in the Chief Justice's view, mooted by Parts I and II-A[74]), the majority's opinion may lead lower federal courts to inappropriately apply the same rationale in other cases involving expert scientific testimony:

> "General observations" by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations — they are not applied to deciding whether or not a particular testimony was or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their amici.[75]

In response, the majority opines that the better course for the Court, once it is agreed that Federal Evidence Rule 702 "confides to the judge some gatekeeper responsibility," is for the Court to "note the nature and source of that duty."[76] But, how much of the "nature and source" of the gatekeeper's duties will flow from *Daubert* to the trial court in Ohio?

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[68] *Id.* at 2797.

[69] *Id.* (citations omitted).

[70] FED. R. EVID. 702, *construed in Daubert*, 113 S.Ct. at 2797.

[71] *Daubert*, 113 S.Ct. at 2797 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985). *See also* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶702[03], at 702-41 to -42.

[72] *Daubert*, 113 S.Ct. at 2797 (citing United States v. Downing, 753 F.2d at 1224, 1238 (3d Cir. 1985)).

[73] *Id.* at 2799 (Rehnquist, C.J., dissenting).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2795 n. 7.

Ohio Evidence Rule 102 and the Significance of Ohio Common Law

Frye met its demise in part because it had been superseded by the Federal Rules of Evidence.[77] Those rules "occupy the field,"[78] and "in principle, under the Federal Rules no common law of evidence remains."[79] The high court noted that a specific rule, Federal Evidence Rule 702, speaks to offers of expert scientific testimony, that nothing in the text of the Rule establishes "general acceptance" as an absolute prerequisite to admissibility, that "[t]he drafting history of Rule 702 makes no mention of *Frye*, and that 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.'"[80]

The Ohio Rules of Evidence expressly provide for the Rules to be construed "to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions."[81] The Federal Rules of Evidence contain no comparable language. While the Ohio and Federal Rules 702 are identical in text, the construction of the two may be significantly different. By virtue of Ohio Evidence Rule 102, Ohio Evidence Rule 702 must be construed consistently with common law, and does not "occupy the field"[82] in the manner attributed to its Federal counterpart.

Does the Ohio trial judge have the ability to serve as the "gatekeeper" called for under *Daubert*? An analysis of two similar cases with very dissimilar results suggests the answer may be "maybe not."

The *Frye* doctrine, it should be noted, found safe harbor in Ohio case law, so as to have been repeatedly embraced prior to the effective date of the Ohio Rules of Evidence.[83] *In City of East Cleveland v. Ferell*,[84] the Ohio Supreme Court approved a rationale similar to that in *Frye* when considering the admissibility of radar evidence in a speeding case: "The type of apparatus purporting to be constructed on scientific prin-

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[77] *Id.* at 2794.

[78] *Id.* (citing United States v. Abel, 469 U.S. 45 (1984)).

[79] *Id.* (quoting United States v. Able, 469 U.S. 45, 51-52 (1984)).

[80] *Id.* (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

[81] OHIO R. EVID. 102:

> The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions.

Id.

[82] *Daubert*, 113 S.Ct. at 2794 (citing United States v. Abel, 469 U.S. 45, 49 (1984)).

[83] OHIO R. EVID. 1102(A) (effective July 1, 1980).

[84] 154 N.E.2d 630 (Ohio 1958).

[85] *Id.* at 632 (citations omitted).

[86] 362 N.E.2d 1239 (Ohio Ct. App. 1976).

ciples must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related arts.'"[85] In *State v. Smith*,[86] the Ohio Court of Appeals held that the results of a gunshot residue test could be admitted only after it was established that "the test was based upon scientific principles which are accepted as dependable for the proposed purpose by the profession concerned in that science or its related art; and has gained general acceptance in the particular field to which it belongs. . . ."[87] The court in *Smith* held the state to the *Frye* standard and reversed a conviction where an investigator had conducted a "modified" gunshot residue test, which relied upon a new theoretical basis for which no "general acceptance" showing had been made.[88]

Frye was thus a known and integral part of Ohio common law of expert scientific testimony prior to 1980. The question then becomes: where does it fit after the passage of the Ohio Rules of Evidence, given the limitation of Ohio Evidence Rule 102 that the Rules be construed "to state the common law of Ohio unless the rule clearly indicates that a change is intended"?[89] Is the *Frye* test of "general acceptance" incorporated into Ohio Evidence Rule 702 as a common-law legacy, or has it been "superseded" by the plain text of Ohio Evidence Rule 702?

The courts themselves have been inconsistent in applying Ohio Evidence Rule 102 or 702. Although it did not make specific reference to Ohio Evidence Rule 702, the Ohio Supreme Court described the threshold for expert testimony in *State v. Thomas*,[90] involving a proffer showing the "battered wife syndrome":

> The sole issue raised by the state in its appeal to this court is whether the trial court committed reversible error by excluding testimony on the subject of the "battered wife syndrome" by an expert on battered wives, where defendant pleaded self-defense to killing her husband. [S]uch expert testimony is inadmissible because it is not distinctly related to some science, profession or occupations so as to be beyond the ken of the average lay person. Furthermore, no general acceptance of the expert's particular methodology has been established.[91]

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[87] *Id.* at 1241.

[88] *Id.* at 1244-47.

[89] OHIO R. EVID. 102. The Staff Notes to Ohio Evidence Rule 702 suggest that nothing in Rule 702 indicates a change is intended: "Rule 702 restates the law of Ohio as to the admissibility of testimony from expert witnesses." OHIO R. EVID 702 Staff Note.

[90] 423 N.E.2d 137 (Ohio 1981), *overruled by* State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[91] *Id.* at 139-40 (Ohio 1981), *overruled by* State v. Koss, 551 N.E.2d 970 (Ohio 1990). (footnote omitted)(citing Frye v. United States, 293 F. 1013(D.C. Cir. 1923); McKay Machine Co. v. Rodman, 228 N.E.2d 304 (Ohio 1967)).

The following year the court of appeals did construe Ohio Evidence Rule 702 (although not with any reference to Ohio Evidence Rule 102), in the case of *State v. Williams*,[92] which involved voiceprint evidence and the testimony of voiceprint experts. In *Williams*, the court applied *Frye* and Ohio Evidence Rule 702 in this way: ". . .new scientific tests when shown to be relevant and to be generally accepted by the scientific community ought to be admitted into evidence. This is certainly in line with Rule 702 of the Ohio Rules of Evidence. . . ."[93]

The court of appeals decision in *Williams* suggests that *Frye* has continued weight in the determination of whether to accept a proffer of scientific evidence, and that to be acceptable, the methodologies must meet the "general acceptance" test announced in *Frye*, even though nothing in Ohio Evidence Rule 702 imposes such a requirement.

On the other hand, the Ohio Supreme Court has explicitly refused to adopt the *Frye* test in one case, observing in a footnote that "[i]t has been persuasively argued that the *Frye* test was silently abolished by the adoption of the Federal Rules of Evidence."[94] In *State v. Johnston*, the Ohio Supreme Court permitted the testimony of a witness in a criminal proceeding who had undergone hypnosis upon a showing that the testimony related to matters recalled prior to hypnosis, so long as its independence was reliably shown.[95] There the court did not mention the role that Ohio Evidence Rule 702 should play but did note, however, that some courts had rejected this type of witness's testimony either "because the technique of hypnotic memory enhancement has not been established under *Frye*" or because the scientifically recognized dangers of such testimony's unreliability outweighed its probative value as a matter of law.[96]

The court in *Johnston* found that a *per se* rule allowing the testimony of persons who had been subject to hypnosis would "in some circumstances allow for the admission of unreliable testimony,"[97] and that a *per se* rule of inadmissibility "would, in some instances, disallow reliable testimony, thus thwarting the truthseeking function of our judicial system."[98] What the *Johnston* court did approve was a rule that, in cases where hypnotically refreshed testimony is offered, trial courts "should hold a pretrial hearing and apply a 'totality of the circumstances' test to determine the reliability of the proposed testimony."[99]

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[92] State v. Williams, No. CA-1999, 1982 WL 2940 (Ohio Ct. App. Feb. 18, 1982), *aff'd* 466 N.E.2d 779 (Ohio 1983).

[93] *Id.* at * 3.

[94] *See* State v. Johnston, 529 N.E.2d 898, 904 n. 5 (Ohio 1988).

[95] *Id.* at 903.

[96] *Id.* at 904 (citations omitted).

[97] *Id.* at 905 (quoting from State v. Iwakiri, 682 P.2d 571, 577-78 (Idaho 1984)).

[98] *Id.* (footnote omitted).

[99] *Id.* at 906 (citing *Iwakiri*, 682 P.2d at 578).

Ten years after the effective date of the Ohio Rules of Evidence, *Frye* continued to be applied, in one case which overruled the decision of *State v. Thomas*,[100] "to the extent that [*Thomas*] holds that expert testimony concerning the battered women syndrome may not be admitted to support the affirmative defense of self-defense."[101] Picking up where *Thomas* left off, the Supreme Court in *State v. Koss* noted that in 1981 in *Thomas* the Court found at the time that "no general acceptance of the expert's particular methodology has been established."[102] However, in the time since *Thomas*, there had developed a substantial body of research and law concerning the "battered wife syndrome," and it was found that expert testimony has been found to "assist the trier of fact to understand evidence or to determine a fact in issue" (although not scientific testimony, but rather "other specialized knowledge" admissible under Ohio Evidence Rule 702).[103]

Koss makes no mention of Ohio Evidence Rule 102, but it does cite three cases from other jurisdictions that had likewise found that the "'battered woman syndrome' has gained substantial scientific acceptance to warrant admissibility."[104] In two of the three cited cases, moreover, the records reflected that, prior to admitting the expert's testimony on the scientific foundations supporting the "battered woman syndrome," the courts had held "*Frye*" hearings to determine whether the methodology used by the experts had attained the requisite level of "general acceptance" in the relevant scientific community.[105] Thus, *Koss* suggests a continuing reliance by the Supreme Court on the "general acceptance" test announced in *Frye*.

If Ohio Evidence Rule 102 is to be read literally, it follows that common law controlling the use of expert testimony would include the *Frye* test, notwithstanding the promulgation of the Ohio Rules of Evidence. Common law is defined as "those principles, usages and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express or positive statute or other written declaration, but upon the statements of principles found in the decisions of the courts."[106] Expert testimony, according to *Frye*, needs to be founded upon methodology that is shown to be "generally accepted" in the relevant scientific community.[107]

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[100] 423 N.E.2d 137 (Ohio 1981), *overruled by* State v. Koss, 551 N.E.2d 970 (Ohio 1990).

[101] *See* State v. Koss, 551 N.E.2d 970, 974-75 (Ohio 1990).

[102] *See id.* at 972 (quoting from State v. Thomas, 423 N.E.2d at 140).

[103] *Id.* at 973.

[104] *Id.* at 974 (citing Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) *overruled by* State v. Stewart, 763 P.2d 572 (Kan. 1988); People v. Torres, 488 N.Y.S.2d 358, 363 (Sup. Ct. 1985),.

[105] *See Torres*, 488 N.Y.S. 2d at 361 ("A Frye hearing . . . was conducted outside the presence of the jury to determine the relevance of her expert opinion as well as its admissibility under the standards for acceptance of scientific evidence."); *Hodges*, 716 P.2d at 563 ("[B]efore expert scientific opinion may be received into evidence, the basis of that opinion must be shown to be generally acceptable within the expert's particular scientific field." (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[106] O. JUR. 3D *Words and Phrases* 263-64 (1991).

[107] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

While *Johnston* suggests that *Frye* may well have passed away from the common law in Ohio long before the *Daubert* decision, *Koss* suggests that *Frye* remains an important means by which expert testimony may be measured.

Johnston makes it clear that the court is not necessarily aided by rigid *per se* rules either for or against the admissibility of testimony based upon novel scientific methods and theories. Rather, the search for truth remains dependent upon flexible tools, and, on occasion, the proponents of novel methods and theories may be justified in asserting that the evidence warrants admission even if it is based upon theories that have not as yet secured "general acceptance" in the relevant scientific community. However, Ohio Evidence Rule 102 may serve to retard the "growth and development of the law of evidence"[108] contemplated by Federal Evidence Rule 102. One result, it appears, is that the restrictions found in Ohio Evidence Rule 102 are simply not applied where circumstances warrant against a literal application of the Rule.

"Growth" v. "Common Law": An Application of Rule 102 Under the Federal Rules and the Ohio Rules of Evidence

The inconsistent application of Ohio Evidence Rule 102 is revealed in the Ohio Supreme Court's treatment of offers of hearsay statements made by a young child to medical personnel in the context of a criminal trial where the defendant is charged with child molestation. In one case, *State v. Boston*,[109] Ohio Evidence Rule 102 was applied to limit the range of the hearsay exception found at Ohio Evidence Rule 803(4),[110] and in *State v. Dever*,[111] Ohio Evidence Rule 102 was found not to impose such a limit.[112]

In *Boston*, the defendant appealed from his conviction of gross sexual imposition.[113] Among his issues on appeal, defendant challenged the use of out-of-court statements by the two and a half year old victim which were made to a pediatrician in the course of a physical examination during a child abuse investigation.[114] Also admitted were the statements made by the child to a counsellor who was a specialist in child sexual abuse.[115] The child's statements to both doctors implicated the defendant and were admitted at trial, but the child herself was found to be "unavailable" for testimony upon questioning by the trial judge.[116]

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[108] FED. R. EVID. 102.
[109] 545 N.E.2d 1220 (Ohio 1989).
[110] *Id.* at 1235-36.
[111] 596 N.E.2d 436 (Ohio 1992).
[112] *Id.* at 446.
[113] *Boston*, 545 N.E.2d at 1225.
[114] *Id.* at 1223.
[115] *Id.*
[116] *Id.* at 1228.

The Ohio Supreme Court considered no fewer than twelve rules of evidence in deciding this case,[117] ultimately reversing the conviction after finding the defendant had been denied a fair trial based upon the admission of testimony from the two expert witnesses.[118] In the course of its decision, the court described the role the Ohio Rules of Evidence play in relation to common law and in contrast to that of the Federal Rules of Evidence, and it explained the limitation imposed upon the Ohio Rules by Evidence Rule 102.[119]

The *Boston* Court first noted that as of 1987, thirty-one states had adopted rules of evidence that follow the federal rules and the Uniform Rules of Evidence, and that each (with the exception of Florida) has a rule of evidence similar to Federal Evidence Rule 102,[120] which states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[121]

The court observed that, of the states adopting such a rule, only Ohio rewrote it, deleting the phrase referring to "the promotion of growth and development of the law of evidence" and adding a sentence involving interpreting the Ohio Rules of Evidence to express common law.[122] "Accordingly," wrote the court, "Evid.R. 102 admonishes the courts of Ohio to construe the Rules of Evidence in a manner consistent with the common law."[123] Perhaps anticipating the difficult task that lay ahead, the Court went on in greater detail:

> The Staff Note to Evid.R. 102 indicates that Evid.R. 102 was drafted with the purpose in mind of limiting the power of Ohio courts to modify the promulgated Rules of Evidence. This is inapposite to Fed.R. Evid. 102 which makes clear that the federal rules shall be construed to *promote* the growth and development of the law of evidence. Thus, Courts in every other state which have adopted rules of evidence and courts in the federal system are permitted to construe the rules of evidence broadly.

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[117] *Id.* at 1227. "Our review of appellant's case necessarily requires us to review, discuss and interpret Evid.R. 102, 601(A), 702, 703, 704, 705, 801(C), 801(D)(1)(c), 802, 803(2), 803(4) and 804(A)(2)." *Id.*

[118] *Id.* at 1227, 1239-40.

[119] *Id.* at 1229.

[120] *Id.*

[121] FED. R. EVID. 102.

[122] *Boston*, 545 N.E.2d at 1229 (citing 1 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA, THE FEDERAL RULES IN THE STATES ¶2.2 (1987).

[123] *Id.*

> Ohio, on the other hand, based on Evid.R. 102, must construe the rules so that they follow Ohio's common law unless the rule clearly indicates that a change is intended.[124]

In applying Ohio Evidence Rule 702 to the testimony of the two doctors who had examined the child victim, the court found their "specialized knowledge" gained through experience, training or education, warranted the admission of expert testimony from both that abuse had occurred.[125] The court observed that the Staff Note to Ohio Evidence Rule 702 states that the rule restates the law of Ohio as to the admissibility of testimony from expert witnesses.[126] The Court elaborated:

> The phrase "other specialized knowledge" is found in the rule and, accordingly, if a person has information which has been acquired by experience, training or education which would assist the trier of fact in understanding the evidence or a fact in issue and the information is beyond common experience, such person may testify. In testifying as to an opinion or inference, the expert may use facts or data perceived by her or admitted in evidence. Evid.R. 703. Even if the expert's testimony provides an opinion on an ultimate issue in a case, it is not objectionable. Evid.R. 704. After there has been a disclosure of the underlying facts or data upon which the expert bases her opinion, the expert may give her reasons for the opinion or inference drawn by responding to a hypothetical question or otherwise. Evid.R. 705. Of course, all of the foregoing is subject to the relevancy requirements of Evid.R. 402 and 403.[127]

While the Court interpreted Ohio Evidence Rule 702 to permit the testimony of the pediatrician and the counsellor as to the fact that the child had been abused, the Court found inadmissible the further testimony of the pediatrician that the child had not fantasized her abuse and had not been programmed to make accusations against her father.[128] Likewise held inadmissible was the testimony of the counsellor as to the veracity of the victim.[129] In reaching this conclusion, the court noted that, in the federal courts and in

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[124] *Id.* (emphasis in original).

[125] *Id.* at 1238-39.

[126] *Id.* at 1231 n.6.

[127] *Id.* at 1231.

[128] *Id.* at 1240.

sister states, Evidence Rule 803(4)[130] is often utilized in child abuse cases and that such cases extend the common law doctrine to admit statements made to a physician or medical attendant without regard to the purpose of the examination or the need for the patient's history. "In other words, the patient's statements are admissible even though made to a physician consulted for the purpose of enabling the doctor to testify and even when no treatment is contemplated."[131]

While state and federal cases cited by the court[132] do extend the common law doctrine so as to permit the use of such statements even when the statement was not one clearly anticipated in Evidence Rule 803(4),[133] Ohio common law allows no such extension. As mentioned by the court, the Staff Note to Ohio Evidence Rule 803(4) states that: "The exception is limited to those statements made by the patient which are reasonably pertinent to an accurate diagnosis and should not be a conduit through which matters of no medical significance should be admitted."[134]

The court in its analysis considered the application of Federal Evidence Rule 803(4) in *United States v. Nick*,[135] a case involving a three-year-old victim of child abuse.[136] In that case, the circuit court did not analyze the child's motivation in telling the doctor about the event, but stated only that "[t]he child's declarations were corroborated by the doctor's examination of the child's clothing...."[137] After noting that both Federal Evidence Rule 803(4) and Ohio Evidence Rule 803(4) were identical[138], the Ohio Supreme Court stated that "by discarding the motivational component of Evid.R. 803(4) and requiring physical corroboration, the federal appellate court has rewritten the rule — or at least very liberally construed the rule to promote the '... growth and development of the law of evidence....'"[139]

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[129] *Id.*

[130] OHIO R. EVID. 803 provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. *Id.*

[131] *Boston*, 545 N.E.2d at 1233 (citing Staff Note to Ohio R. Evid. 803(4)).

[132] *See id.*

[133] I.e., it is not (1) a medical history, (2) past or present symptoms, pain or sensations, or (3) a description of the inception or general character of the cause or external source of the disease or injury, made by the patient for purposes of medical diagnosis or treatment and reasonably pertinent to diagnosis or treatment. *Id.*

[134] *Boston*, 545 N.E.2d at 1233 (quoting Staff Note to OHIO R. EVID. 803(4)).

[135] 604 F.2d 1199 (9th Cir. 1979).

[136] *Boston*, 545 N.E.2d at 1233.

[137] *Id.* at 1234 (citing United States v. Nick, 604 F.2d 1199 (9th Cir. 1979)).

[138] *Id.*

[139] *Id.* (citing FED. R. EVID. 102).

However, the court went on to say that in Ohio, courts are not free to construe the Ohio Rules of Evidence for the "promotion of growth and development of the law of evidence" as is provided for in the Federal Rules of Evidence,[140] not even in the compelling case of alleged child abuse where the victim is by virtue of age not available to testify in a court setting. The court observed:

> As can be seen, applying Evid.R. 803(4) in child abuse cases involves certain inherent dilemmas. Many courts have broadly interpreted Evid.R. 803(4) or its equivalent in order to avoid these problems so that the statements of children would be admissible. Although it is understandable that courts would strive to admit these statements, many courts appear so result-oriented that they emasculate Evid.R. 803(4) or its federal or sister-state equivalent. Furthermore, since [Ohio] Evid.R. 102 requires that the Rules of Evidence comply with Ohio's common law, unless the particular rule specifically states otherwise, Ohio courts are prohibited from indulging in a broad reading of Evid.R. 803(4).[141]

Boston is instructive in its juxtaposition of the limitation imposed by Ohio Evidence Rule 102 with other specific Rules of Evidence in a case which seemingly cries out for a broad reading of the specific rule, but where common law prohibits such a reading. The lesson appears to be that Ohio Evidence Rule 102 means exactly what it says, that construing the Rules carries with it an obligation to consult common law precedent when determining the breadth of the Rules. As applied in *Boston*, Ohio Evidence Rule 102 tethered the scope and breadth of an important hearsay exception, even though doing so had the result of requiring a new trial and possibly making it more difficult generally to secure convictions against abusers of children too young to qualify as witnesses at trial.

Recognizing the sweep of its decision, the court established its own set of evidentiary guidelines for use in child abuse cases and specifically expressed the hope that:

> . . . the Ohio Supreme Court Rules Advisory Committee and the General Assembly of Ohio will review the entire problem and promulgate rules and statutes that will assist our courts in dealing with prosecutions in child abuse cases. In that regard, we respectfully refer these matters to the rules committee and our state's legislative body.[142]

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[140] FED. R. EVID. 102.

[141] *Boston*, 545 N.E.2d at 1236.

[142] *Id.* at 1238. As a result of the Court's statement, on July 1, 1991, it adopted Ohio R. Evid. 807, which provides specific instructions for determining when out-of-court statements made by a child under age twelve describing sexual acts performed by, with, or on the child are not excludable as hearsay under Ohio R. Evid. 802. Recently, in In Re Coy, 616 N.E.2d 1105 (Ohio 1993), the Court found that R.C. 2151.35(F), a statute enacted in 1989 after the facts in *Boston* occurred and designed to achieve the same goal as Ohio R. Evid. 807, but which established different guidelines, was invalid. Noting Ohio R. Evid. 802, the Court stated that:

Four years after *Boston* was decided, the Ohio Supreme Court again had before it the question of how Ohio Evidence Rule 102 should be applied to Ohio Evidence Rule 803(4). The context of the case was once again the admissibility of hearsay statements given by a young child to medical personnel during the course of an investigation into a charge of child molestation. In *State v. Dever*[143] the defendant had been convicted of rape based on an incident involving his four and a half year old adopted child.[144] Shortly after the incident, the child had been examined by a physician who did not detect physical signs of recent sexual conduct but did hear the child describe events that led to the charge.[145]

At trial, the court found the child incompetent to testify pursuant to Ohio Evidence Rule 601[146] and, over objection, permitted the examining physician to testify as to what the child told her during the examination.[147] After being convicted, Dever argued on appeal that the trial court erred by allowing the physician to testify as to the child's out-of-court statements, and the court of appeals affirmed, recharacterizing the trial court's determination under Ohio Evidence Rule 601[148] as a finding that the child was unavailable to testify under Ohio Evidence Rule 803(4). When finally presented to the Ohio Supreme Court[149] the question was whether the trial court abused its discretion in admitting the hearsay testimony pursuant to Ohio Evidence Rule 803(4).[150]

> hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, *by statute enacted by the General Assembly not in conflict* with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

Id. at 1108.

The Court went on to hold that "R.C. 2151.35(F) is inconsistent with Article VIII of the Ohio Rules of Evidence and, as such, has no force or effect."

Id.

[143] 596 N.E.2d 436 (Ohio 1992).

[144] *Id.* at 438-39.

[145] *Id.* at 439.

[146] *Id.* at 436.

[147] *Id.*

[148] OHIO R. EVID. 601 (General Rule of Competency) (presumably Ohio Evid. R. 601(A): "Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. . . .").

[149] Dever appealed the decision of the court of appeals to the Ohio Supreme Court, which overruled his motion for leave to appeal. State v. Dever, 556 N.E.2d 526 (Ohio 1990). He then appealed to the United States Supreme Court, which vacated the judgment of the Hamilton County Court of Appeals, and remanded the cause to the appellate court for further consideration in light of State v. Wright, 497 U.S. 805 (1990). Dever v. State, 498 U.S. 1009 (1990). The court of appeals then reversed the judgment of the trial court and remanded the cause for a new trial. State v. Dever, 579 N.E.2d 213 (Ohio 1992). The state then took this appeal. *Dever*, 596 N.E.2d at 439.

[150] *Dever*, 596 N.E.2d at 440.

As the court states in its opening paragraph, "This case presents the continuing problem of reaching just results in child abuse cases involving statements made by young children during the course of a medical examination."[151] In order to reach those "just results," the court carefully considered the *Boston* holding and "modified" it.[152] While "recogniz[ing] that Evid.R. 102 significantly restricts our ability to interpret the Ohio Rules of Evidence," the court found *Boston* to be too "restrictive" in its approach to interpreting Ohio Evidence Rule 803(4).[153] The court took issue with *Boston's* emphasis on the requirement that in order to be admissible under Evidence Rule 803(4), the child's statement to the doctor must be related to the child's motivation for treatment:

> *Boston* gives the impression that if the slightest possibility exists that the child's statements were not motivated by her own desire to obtain medical diagnosis or treatment, the statements may not come in as an Evid. R. 803(4) exception. We believe that it is not necessary to apply that approach to every instance in which a child of tender years makes a statement in the course of diagnosis and treatment. While we recognize that a young child would probably not personally seek treatment, but would generally be directed to treatment by an adult, we do not find that the child's statements relating to medical diagnosis or treatment are always untrustworthy for that reason alone.[154]

In his dissent, Justice Wright took issue with this deviation from the interpretation of Ohio Evidence Rule 102:

> The majority's decision not only allows the child to speak through the mouths of others in a situation where the child cannot be questioned, but also gives the child's words the extra authority of being spoken by a doctor. Moreover, the testimony does not possess the traditional guarantees of reliability that form the basis for this particular hearsay exception. Evid.R. 102 mandates that this court construe the Ohio Rules of Evidence in accordance with the common-law basis for those rules. It is not the province of this court to eviscerate those rules in order to make it easier for the state to prosecute certain categories of crime.[155]

That the majority's construction indeed does deviate from the common law and may thus be inappropriate under Ohio Evidence Rule 102 is suggested by Justice Resnick in

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[151] *Id.*

[152] *Id.* at 443.

[153] *Id.* (footnote omitted).

[154] *Id.* at 443.

[155] *Id.* at 450 (Wright, J., dissenting).

a note, which observed that the final version of Ohio Evidence Rule 102 was the result of an overcautious response to fears of judicial over-reaching that accompanied the drafting of Federal Evidence Rule 102:

> Perhaps the time has come to reevaluate Ohio's Evid. R. 102 as it now exists. While federal courts and courts of most states allow evolutionary development of the law of evidence, Ohio courts are required to apply the common law to evidence rules which are almost certainly inconsistent in spirit, if not in literal wording, with many common-law foundations. An amendment of Evid.R. 102, to put it in step with Fed.R.Evid. 102, is an idea whose time has come. The drafters of Ohio's Evidence Rules feared dire consequences if Ohio adopted an Evid.R. 102 identical to the federal version. *See*, Walinski & Abramoff, The Proposed Ohio Rules of Evidence: The Case Against (1978), 28 Case W.Res.L.Rev. 344, 370 (arguing that Ohio's then-proposed Evid.R. 102, to be identical to Fed.R. Evid. 102, constituted a "disturbing feature" of the evidence rules.). Ohio Evid.R. 102 was altered in response to such criticism, but the perceived horrors associated with the federal counterpart have not materialized.[156]

The court makes reference to the "disturbing feature" of the proposed rules, referring to the critique of the Rules found in Walinski & Abramoff's article, "The Proposed Ohio Rules of Evidence: The Case Against."[157] The authors' concern, as noted by the *Dever* court, was, in short, that the proposed rules would constitute an overbroad grant of "discretion" to the trial judge to decide questions of admissibility of evidence.[158] The article points out that "[d]iscretion recognized by the proposed Ohio Rules of Evidence ranges from the trial judge's traditional discretion in controlling such matters as the mode and order of interrogating witnesses to several newly conceived areas of discretion."[159]

> Rule 403 expressly confers power upon the trial judge to exclude evidence *that is otherwise clearly admissible* under some other principle of evidence if the judge, for example, feels that the evidence will "waste. . . time" or mislead the jury. The breadth of discretion given by Rule 403 is as broad as the Rules of Evidence themselves, for on its face Rule 403 'apparently cuts across the entire body of the Rules, and allows ad hoc exclusion where prejudice, time and the like are deemed to outweigh probativity.'[160]

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[156] *Id.* at 443 n.6.

[157] Richard S. Walinski & Howard Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 370 (1978).

[158] *Id.* at 367.

[159] *Id.*

[160] *Id.* (footnotes omitted).

This "broad discretion [conferred] on the trial judge to fashion his own, case-by-case exceptions to the general rule that hearsay is inadmissible"[161] is cast by the authors as being "far more radical than first appears on the face of those rules that expressly grant discretion."[162] In stating the case against Federal Rule of Evidence 102 the authors described the decision in the case of *United States v. Batts*.[163] In *Batts*, the trial court admitted extrinsic evidence introduced to impeach a testifying defendant with proof of alleged prior misconduct.[164] The evidence was admitted, although it would properly be barred by Federal Evidence Rule 608(b).[165] The authors note the trial court's reliance on Federal Rule 102, and its observation that a single rule of evidence (in this case, Federal Evidence Rule 608(b)) should not be read in isolation.[166] According to the authors, Federal Evidence Rule 102 requires that "the trial judge must be given discretion to ignore a rule of evidence, even one that Congress chose to make mandatory, if he believes that the whole 'truth' as he perceived it, might not be served."[167]

This proposed grant of discretion was unsettling to the authors, and, in their view, Federal Evidence Rule 102 warranted further examination before being adopted in Ohio because of the absence of any role for the common law in the trial court's determination.[168]

> It is important to note, as a measure of the breadth of the trial judge's discretion under this view, that when the court of appeals licensed the trial judge to suspend the Federal Rule in the service of truth, it neither held nor suggested that the suspension of the Federal Rules of Evidence reinstates the common law rule on the issue. The trial judge's pursuit of truth is thus utterly without guide or rule, except for the subjective beacon of truth itself.[169]

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[161] *Id.* at 368.

[162] *Id.* at 369.

[163] 558 F.2d 513 (9th Cir. 1977).

[164] *Id.* The defendant was charged with certain crimes relating to hashish. When arrested he had a "coke" spoon around his neck. At trial, he denied on cross-examination any knowledge that the "coke" spoon is commonly used to sniff cocaine. *Id.* at 514-15. *See also* Walinski & Abramoff, *supra* note 157, at 369, n.102. The government produced testimony that several months before the defendant had sold a large amount of cocaine to an undercover agent. *Batts*, 558 F.2d at 516. No conviction resulted, however, because of an illegal search and seizure. *Id. See also* Walinski & Abramoff, *supra* note 157, at 369.

[165] FED. R. EVID. 608(b) in pertinent part provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than a conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." *Id.*

[166] *Batts*, 558 F.2d at 517, *noted in* Walinski & Abramoff, *supra* note 157, at 369, n. 107.

[167] Walinski & Abramoff, *supra* note 157, at 369-70.

[168] *Id.* at 370.

[169] *Id.*

Twenty-five years of evidentiary jurisprudence gives some cause to believe the authors' concerns have not materialized, as Justice Resnick notes in *Dever* in her call to amend Ohio Evidence Rule 102.[170] Moreover, the authors appear to have overlooked the negative implications of restricting the powers of the trial judge to only those readily available under the common law. The common law may never have anticipated the rapidity of advances in science and the legal complexities that accompany such advances. While *Daubert* makes plain the need for active jurisprudence and an informed bench when a court is confronted with novel scientific methodology, Ohio common law simply does not accommodate a trial court's need to participate in such sophisticated and technically complex litigation. And even though the Federal approach may have been troubling (in the abstract) twenty-five years ago, it now predominates the field in much the same way that *Frye* dominated the field until the enactment of the Federal Rules of Evidence.

A Proposal for Change

In Ohio courts, as in courts across the country and around the world, science and the law meet daily, often with results that properly serve neither discipline. A trial court should be in a position to secure the best evidence, and such evidence in a technical setting frequently involves novel methodologies. However, courts may be unprepared to separate the meritorious scientific analysis from the modern forms of quackery that might attempt entry into the courtroom. As Judge Patrick Higginbotham stated in describing the court's role in the admissibility of expert testimony, "it is time to take hold of expert testimony in federal trials."[171] There is no good reason for not doing the same in Ohio trials.

In order to realize the potential offered in *Daubert*, two rules should be reexamined: Ohio Evidence Rule 102 should be amended to match the language found in Federal Evidence Rule 102. Ohio's body of law should not have to tolerate the inconsistencies shown in the cases construing Ohio Evidence Rule 102 where it is readily apparent that the restriction imposed by Ohio Evidence Rule 102 is neither needed nor helpful.

The demand for a more scientifically informed judiciary has never been more evident. Recent developments in science covering diverse topics such as the medical implications of silicone breast implants, work-related issues like repetitive stress injury, and concerns of microwave radiation associated with the widespread use of cellular telephones are indicative of the need to anticipate a heavy burden on the courts as claims arising from harms associated with such innovations increasingly become the subject of lawsuits.[172]

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[170] State v. Dever, 596 N.E.2d 436, 443 n. 6 (Ohio 1992).

[171] Skaggs, *supra* note 2, at 1201 (quoting *In re* Air Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986)).

[172] *See* CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, & GOV'T, *supra* note 1, at 14.

Amending Ohio Evidence Rule 102 will not, of course, greatly ease the trial court's task when confronting novel scientific methodology. *Daubert* foresees battles between qualified experts who, by their forensic presentations, will enable a court to resolve the relative merits of a given case. "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."[173] The success of such an exchange in the federal forum rests, in part, on the court's ability to appoint its own experts as provided for by Federal Evidence Rule 706.[174] Ohio has no similar rule or law but relies instead on piecemeal legislation or common law to determine whether the court may appoint specific types of expert witnesses.[175] The advantages of Federal Evidence Rule 706 include the provision for the court, if need be, to call the witness, and (in civil litigation) to charge the cost of such expert to "the parties in such proportion and at such time as the court directs."[176]

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[173] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786, 2798 (1993) (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)).

[174] FED. R. EVID. 706 entitled "Court Appointed Experts," provides:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
>
> (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
>
> (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Id.

[175] See, e.g., OHIO REV. CODE ANN. § 120.33(D) (Anderson 1990), which "is arguably broad enough to encompass funds sought to employ an expert witness" for DUI defendants. State v. McLaughlin, 562 N.E.2d 1387, 1391 (Ohio Ct. App. 1988).

[176] FED. R. EVID. 706(b).

CONCLUSION

Daubert brings attention to a need to "take control" over the process by which novel scientific testimony is offered in court. Trial judges and administrative agency hearing officers throughout the State of Ohio are made aware of this need on an increasingly frequent basis as technological innovations make their way to the courtroom and hearing room. *Daubert* also points out that there is, in the federal evidence scheme, an expectation that the courts will become active participants in advancing "scientific knowledge" in the courtroom.[177] Are Ohio's courts likely to be able to meet this challenge?

A recent Report of the Carnegie Commission entitled "Science and Technology in Judicial Decision Making—Creating Opportunities and Meeting Challenges"[178] offers this assessment:

> The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the judiciary will be undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day. There may be calls to replace the current system with new institutions and procedures that appear to be more suited to the demands of science and technology.[179]

Ohio courts need the ability to respond to the new demands of science. Courts needing expert testimony on novel scientific methodologies should be free to benefit from the *Daubert* decision and should not be restricted to admitting only such evidence as would be permitted under Ohio common law. Using Federal Evidence Rule 706 as a model, Ohio courts could be empowered to retain the services of experts in service not to the parties but instead to the court. As observed in the Carnegie Commission's report, "confidence in the judiciary"[180] requires that the public be confident that the court is a place where, when circumstances demand, even complex and novel scientific theories can be presented and applied or rejected as appropriate. Anything short of that will not likely withstand the test of time.

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[177] *Daubert*, 113 S.Ct. at 2795.

[178] CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, & GOV'T, *supra* note 1.

[179] *Id.* at 11.

[180] *Id.*