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Recommended Citation
Available at: https://doi.org/10.37419/TWLR.V3.I2.3

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TALLER AND BETTER LOOKING JUDGES IN TEXAS

HONORABLE ROBERT MCGRATH†
PAULA R. MOORE‡‡

I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for men without any knowledge of even the rudiments of chemistry to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils .... How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

INTRODUCTION

Trial judges in Texas got taller and better looking when the Texas Supreme Court recognized their role as gatekeepers. To some extent the trial bench has always been the guardian of truth and justice in regulating what evidence is admitted and what is excluded. However, E.I. DuPont de Nemours & Co. v. Robinson cast trial judges in the role of evidence police. Now, when the admissibility of expert testimony is challenged, the testimony must be such that the trial judge is comfortable with its integrity. The supreme court speaks of this “integrity” in terms of being “reliable” and “relevant.” What this really addresses is whether the expert opinion merits consideration.

As science has progressed throughout the century, the legal system has attempted to develop coherent tests for the admissibility of scientific evidence. However, “[i]n the latter part of the twentieth century,

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2. See E.I. Du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
3. Id.
4. See David Holman, Protecting Your Experts from Daubert/Robinson Challenges, Products Liability, What’s Next After Tort “Reform?” in Texas, in TEXAS TRIAL LAWYERS ASSOCIATION ADVANCED PRODUCTS LIABILITY SEMINAR 2 (1996) (Prior to the Robinson decision the supreme court held that the opinion testimony of a qualified expert was admissible and probative “and that questions of reliability, method, factual basis, credibility, and the like are questions for the trier of fact.”); See also Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 460 n.4 (Tex. 1992); Polk County v. Tenneco, Inc., 554 S.W.2d 918, 924 (Tex. 1977); Texas Electric Serv. Co. v. Wheeler, 551 S.W.2d 341, 342-43 (Tex. 1977).

DOI: https://doi.org/10.37419/TWLR.V3.I2.3
courts and practitioners have faced an increasing variety of scientific
evidence in a wide spectrum of cases," both civil and criminal. In
Robinson, the Texas Supreme Court developed a test pursuant to
Rule 702 to determine the admissibility of scientific evidence at trial.

Robinson involved a product liability claim where the plaintiffs con-
tended a fungicide manufactured by DuPont was contaminated and
damaged their pecan trees. Testimony offered by the Robinsons' sole
expert was challenged by DuPont on several factors. The trial judge
accepted DuPont's argument and excluded the expert's testimony
concluding it was not reliable and would not "fairly assist the trier of
fact in understanding a fact in issue in the case." Reversing, the court
of appeals held the expert's testimony was admissible because it was
"relevant to causation and . . . [t]he weight to be given his testimony
or the credibility of [the scientist] as an expert witness . . . is to be
determined by the trier of fact." However, the supreme court af-
affirmed the trial court and held the expert's testimony and opinion
were not reliable and accordingly reversed the judgment of the court
of appeals.

This article provides a view from the bench as to what trial judges
face in properly handling Robinson Challenges when advocates
bring them to the courtroom, and the possible effect on the litigation
process. Part I identifies the various admissibility standards applied in
Texas before Robinson, and outlines the standards used in other state
courts. Next, Part II details the implications the Robinson decision
may have on Texas trial practice, and its effect on lawsuits that involve
scientific evidence. Finally, Part III examines the implications of
Robinson for appellate procedures. We conclude the striking of a wit-
ness is most problematic when he is the sole expert witness on causa-
tion, thus vital to the trial advocate's case.

6. Id. at 1486.
7. See Robinson, 923 S.W.2d at 551.
8. See id. at 552.
9. Id.
App.—Fort Worth 1994), rev'd, 923 S.W.2d 549 (Tex. 1995).
11. Robinson, 923 S.W.2d at 550.
12. See id. at 560; see also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579
(1993) (describing scientific evidence as not "reliable;" where testimony is not
grounded in the methods and procedures of science it is no more than "subjective
belief or unsupported speculation").
13. Challenges to admissibility of expert testimony submitted to the court are
often referred to as "Robinson Challenges" and may be presented to the trial court
at any time before the case goes to the jury in the form of a motion for summary judg-
ment, or motion to strike. Such motions have a potential result of a final judgment
being rendered in favor of the challenging party removing any opportunity to allow

14. Other commentators agree that the Robinson decision will place a burden on
trial judges to make judgments on the admissibility of testimony that may take more
ease than most people in the legal profession possess. See David E. Colmenro,
I. EVIDENTIARY STANDARDS FOR EXPERT TESTIMONY

A. Scientific Evidence and the Standard of Admissibility

The Federal Rule of Evidence,15 which many states have adapted, provides only vague guidelines regulating the admission or exclusion of expert testimony. Therefore, as litigation has grown more complex, courts have found it necessary to devise judicial standards to overlay the Federal Rule.16 These judicial standards are based on fundamental principles of evidence applied to balance relevancy17 against unfair prejudice.18 The practical application of these fundamental standards has varied over time, and from jurisdiction to jurisdiction.19

The first widely recognized judicial standard for admitting scientific evidence is found in Frye v. United States.20 Frye concerned the admissibility of results from a precursor to the current polygraph test.21 Frye held that an expert opinion based on a scientific technique is inadmissible unless the technique is generally accepted as reliable in the relevant scientific community.22 As late as the 1970's, Frye's general acceptance standard was the controlling standard in forty-five states;23 however, after the enactment of the Federal Rules of Evidence in 1974, some states began to adopt Rules verbatim to Federal

Note, A Dose of Daubert to Alleviate "Junk Science" in Texas Courtrooms: Texas Adopts the Federal Standard for Determining the Admissibility of Scientific Expert Testimony: E.I. DuPont De Nemours & Co. v. Robinson, 38 Tex. Sup. Ct. J. 852 (June 15, 1995), 27 Tex. Tech. L. Rev. 293, 324 (1996) (suggesting that the burden on judges may be lessened by creating an independent panel comprised of judges and scientists); Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 Harv. L. Rev. 941, 948-50 (1997) (noting that Federal Rule of Evidence 706 allows court appointed experts, and suggests that trial judges have court appointed technical advisors). Robinson's effect, therefore, is to put the trial judge in a position to have to balance one party's effective use of strategy against promoting a fair chance at full litigation of the issues and allowing the other party an opportunity to cure.

16. See infra notes 29-33 and accompanying text.
17. See Fed. R. Evid. 401 (defining relevant evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence").
18. See Fed. R. Evid. 403 (listing unfair prejudice, confusion, and waste of time as reasons to exclude relevant evidence).
20. 293 F. 1013 (D.C. Cir. 1923) (determining admissibility of expert's opinion as to a lie detector test).
21. See id. at 1013.
22. See id. at 1014.
Rule of Evidence 702. Many of these states then began to apply admissibility standards fashioned from their interpretations of that rule. In 1993, in Daubert v. Merrell Dow Pharmaceuticals, Inc., the United States Supreme Court, interpreting Federal Rules of Evidence 104(a), 401, 402, and 702, set a new standard for the admission of scientific evidence offered by experts.

The general admissibility standards for scientific evidence have been addressed in nearly every state’s case law since Daubert. Seventeen states either adhere strictly to the Frye general acceptance standard or apply some variation. Seven states have expressly adopted the Daubert standard. Twenty-one states apply a Daubert-type standard, having adopted a rule identical to the Federal Rule, but adding their own interpretations. Five states have refused to adopt Frye, or Daubert and have developed or maintain their own standards.

B. The Other Standards

1. The Frye Standard

The Frye standard was articulated in 1923 and is still the standard in some states. Under Frye, the testimony of experts is admissible when the average person lacks the special knowledge and skills that the expert has in forming a “correct judgment” as to the subject matter at issue. However, the court also recognized the inherent problem of determining when, in a particular field of inquiry, it is appropriate to draw the line between scientific principles that are still in the experi-

24. The Rule states: “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.” Fed. R. Evid. 702.
25. See infra notes 122-133 and accompanying text.
27. The factors set out in Daubert include whether the theory or technique in question can be tested, whether it has been subjected to peer review and publication, its known or potential error rate, the existence and maintenance of standards governing its use, and whether it has attracted widespread acceptance within a relevant scientific community. See id. at 592-95.
30. Kentucky, Louisiana, Massachusetts, Montana, Oklahoma, South Dakota, and Texas.
33. 293 F. 1013, 1014 (D.C. Cir. 1923).
mental stage and those that are in the demonstrable stage.\textsuperscript{34} Presumably, if the principles governing the expert testimony are at the demonstrable stage, as defined by the consensus of other authorities in the same field, then the testimony can be properly admitted.\textsuperscript{35} Thus, the \textit{Frye} standard is ultimately a consensus test among experts in a particular field.\textsuperscript{36}

Among some states still employing the \textit{Frye} standard, is a consistency of reasoning that the \textit{Daubert} standard is lacking or incomplete. For example, the Arizona Supreme Court rejected the \textit{Daubert} standard in favor of the \textit{Frye} standard stating, "\textit{Daubert} leaves many questions unanswered."\textsuperscript{37} California likewise rejected \textit{Daubert}\textsuperscript{38} choosing instead, to follow their own test derived from \textit{Frye}.\textsuperscript{39} Moreover, Michigan rejected \textit{Daubert} in favor of \textit{Frye} concluding that scientific tests need not be infallible, but only that reasonable certainty follow from them.\textsuperscript{40} Further, Kansas rejected the \textit{Daubert} standard reasoning that its application is limited only to federal courts.\textsuperscript{41} New York also endorses and applies only the \textit{Frye} standard\textsuperscript{42} but bolsters it with additional requirements.\textsuperscript{43}

Some states retain \textit{Frye} without offering much explanation. For example, Colorado specifically rejected \textit{Daubert} and the Federal Rules

\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{36} The consensus is referred to as "general acceptance" in later cases, and was deemed to have been overruled by the adoption of the Federal Rule of Evidence 702 by the Supreme Court in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579, 587 (1993).
\textsuperscript{37} Arizona v. Bible, 858 P.2d 1152, 1183 (Ariz. 1993); Arizona v. Johnson, 922 P.2d 294, 296 (Ariz. 1996). The court, quoting Bible, stated: \textit{Daubert} leaves many questions unanswered and [in Bible] we concluded that we would continue to follow \textit{Frye}, at least for the present. In doing so we stated that notwithstanding legitimate criticism of \textit{Frye} and our desire to preserve uniformity where possible [that] . . . even were we to use \textit{Daubert's} reliability/scientific validity analysis, we would still be left with the problem posed by \textit{Frye}: precisely when "in [the] twilight zone the eventual force of the [scientific] principle must be recognized." Johnson, 922 P.2d at 296.
\textsuperscript{38} See, e.g., People v. Leahy, 882 P.2d 321 (Cal. 1994).
\textsuperscript{43} See People v. Castro, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989) (holding that novel scientific evidence may be admitted if it has gained general acceptance in the relevant scientific community, if the particular techniques generating such evidence have gained general acceptance in the relevant scientific community, and if the testing laboratory in the particular case properly performed the accepted scientific procedures in reaching the results).
of Evidence approach.44 Minnesota considered, but rejected, Daubert;45 similarly Florida46 and New Jersey have “explicitly declined to part from the general acceptance requirement.”47 North Carolina48 and Washington49 likewise continue to adhere to the Frye standard.

The Supreme Court’s interpretation of Rule 702 suggests that Daubert is the appropriate standard regarding the admissibility of scientific evidence. Interestingly, some states that have adopted a rule of evidence identical to Rule 702, reject the Daubert standard, and choose to retain the Frye standard.50 For example, the Alaska Supreme Court considered Daubert,51 yet rejected it despite the supreme court’s holding that the Frye standard was superseded by the enactment of the Federal Rules of Evidence.52 Further, although in 1975 Nebraska enacted rules mirroring the Federal Rules of Evidence, it applies the Frye standard,53 reasoning that Frye “endorses the soundness of the scientific principle that is at the root of the evidence, and the jury is not required to pass on scientific reliability of the process involved.”54

Missouri utilizes a Frye standard55 and a rule virtually identical to Federal Rule of Evidence 702.56 However, no Missouri case has yet to decide what, if any, impact its adoption of a rule similar to the Federal Rule of Evidence 702 will have on the application of Frye, much less

44. See Fishback v. People, 851 P.2d 884 (Colo. 1993).
45. See State v. Bauer, 512 N.W.2d 112 (Minn. Ct. App. 1994), aff’d, 516 N.W.2d 174 (Minn. 1994). See also State v. Klawitter, 518 N.W.2d 577, 578 n.1 (Minn. 1994) (recognizing that the United States Supreme Court overruled Frye in Daubert but declining to express an opinion on the continued vitality of the Frye rule in Minnesota); State v. Schwartz, 447 N.W.2d 422, 424 (Minn. 1989) (rephrasing the Frye standard to require that experts in the field generally agree that the evidence is reliable and trustworthy); Wesely v. Alexander, 1996 WL 722084 (Minn. Ct. App. 1997).
46. See Flanagan v. State, 625 So. 2d 827 (Fla. 1993) (citing Stokes v. State, 548 So. 2d 188 (Fla. 1989)).
50. That fact is not so contradictory, however, since the wording of Federal Rule of Evidence 702 itself offers no clue to any particular judicial standard of review.
52. See id. at 136.
54. Id. at 779.
55. See Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985) (en banc).
56. See MO. ANN. STAT. § 490.065 (West 1996) (stating in any civil action, 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).
whether the rule compels application of the *Daubert* standard.\textsuperscript{57} Mississippi has yet to consider adopting *Daubert*\textsuperscript{58} Like Mississippi and Missouri, Illinois\textsuperscript{59} and Connecticut\textsuperscript{60} have not addressed the issue of whether to adopt *Daubert* or retain the *Frye* standard.

2. The *Daubert* Standard

The *Daubert* standard finds its basis in Federal Rule of Evidence 702 itself. In *Daubert*, the Court articulated the standard construing Federal Rules of Evidence 104(a),\textsuperscript{61} 401,\textsuperscript{62} 402,\textsuperscript{63} 403,\textsuperscript{64} and 702.\textsuperscript{65} The *Daubert* Court promulgated the standard in an attempt to distinguish experimental stage scientific principles from demonstrable principles,\textsuperscript{66} the latter of which the *Frye* standard deems admissible.\textsuperscript{67} But, whereas the *Frye* court looked to a consensus of experts, the *Daubert* standard places the burden of deciding the merits of a scientific principle more squarely on the shoulders of the trial judge.

Specifically, the *Daubert* standard holds that expert testimony is admissible if it is (1) reliable\textsuperscript{68} and (2) relevant.\textsuperscript{69} Evidence is reliable if the trial judge finds that the “reasoning or methodology” is “scientifically valid.”\textsuperscript{70} Among the factors that are involved in determining the reliability of scientific methodology are the use of the traditional scientific method,\textsuperscript{71} the exposure of the methodology to peer review,\textsuperscript{72} and the potential rate of error and physical standards involved in the

\begin{itemize}
\item \textsuperscript{57} See Schumann v. Missouri Highway & Transp. Comm'n, 912 S.W.2d 548 (Mo. Ct. App. 1996).
\item \textsuperscript{58} See Hardy v. Brantley, 471 So. 2d 358, 366 (Miss. 1985); House v. State, 445 So. 2d 815, 822 (Miss. 1984).
\item \textsuperscript{61} See id. at 592. See also *Fed. R. Evid.* 104(a) (discussing questions of admissibility generally).
\item \textsuperscript{62} See *Daubert*, 509 U.S. at 587. See also *Fed. R. Evid.* 401 (defining relevant evidence).
\item \textsuperscript{63} See *Daubert*, 509 U.S. at 587. See also *Fed. R. Evid.* 402 (finding relevant evidence generally admissible).
\item \textsuperscript{64} See *Daubert*, 509 U.S. at 595. See also *Fed. R. Evid.* 403 (listing factors allowing the exclusion of relevant evidence).
\item \textsuperscript{65} See *Daubert*, 509 U.S. at 587. See also *Fed. R. Evid.* 702 (discussing expert testimony).
\item \textsuperscript{66} See *Daubert*, 509 U.S. at 592-93.
\item \textsuperscript{67} See id. at 597-98.
\item \textsuperscript{68} See id. at 590 (reliable “'scientific' [testimony] implies a grounding in the methods and procedures of science”).
\item \textsuperscript{69} See id. at 591 (“[T]estimony which does not relate to any issue in the case is not relevant, and, ergo, non-helpful.”).
\item \textsuperscript{70} Id. at 592-93.
\item \textsuperscript{71} See id. at 593.
\item \textsuperscript{72} See id. at 593-94.
\end{itemize}
experimentation and methodology itself.73 Evidence is relevant if the judge determines that, pursuant to Federal Rule of Evidence 104(a), it "will assist the trier of fact to understand or determine a fact in issue."74

Although some states retaining the Frye standard also operate under a rule identical to the Federal Rule, states that have expressly adopted Daubert say they have done so because their rules are identical to the Federal Rule. For instance, Kentucky rejected the Frye standard75 and adopted the Daubert standard76 after adopting a rule of evidence identical to Federal Rule 702 in 1992.77 Louisiana, likewise has adopted Daubert. The Louisiana Supreme Court, in adopting the Daubert standard, explained that "much of the Louisiana Code of Evidence [was] patterned after the Federal Rules of Evidence."78 Thus, to facilitate national uniformity, the Louisiana court found it appropriate to adopt the Daubert standard.79 Hence, Louisiana modified its standard of admissibility, already similar to the Daubert standard,80 to a strict adoption of Daubert.81 Montana also expressly adopted the Daubert standard,82 and rejected the Frye general acceptance standard.83 The Oklahoma Supreme Court also abandoned the Frye standard and expressly adopted the Daubert standard,84 as did South Dakota85 and Massachusetts.86

Several states have neither expressly adopted Daubert nor rejected Frye. Rather, they apply a Daubert-type standard. Still other states reject the Daubert standard as being too determinative and instead apply individual evidentiary rules and standards. Yet, some states rec-

73. See id. at 594.
74. Id. at 592.
75. See Harris v. Commonwealth, 846 S.W.2d 678 (Ky. 1992).
76. See Mitchell v. Commonwealth, 908 S.W.2d 100, 101 (Ky. 1995); Cecil v. Commonwealth, 888 S.W.2d 669 (Ky. 1994).
77. See KY. R. EVID. 702.
78. State v. Foret, 628 So. 2d 1116 (La. 1993).
79. See id. at 1123.
80. See State v. Catanese, 368 So. 2d 975 (La. 1979) (setting forth a probative value versus prejudicial effect balancing test, focusing upon concerns that the trier of fact might assign too much weight to the expert opinion, the quality of such evidence, and the existence of either judicially or legislatively-created "procedural safeguards" regulating the admissibility of such evidence at trial). See id. at 982.
81. See Foret, 628 So. 2d at 1123.
82. See State v. Moore, 885 P.2d 457 (Mont. 1994).
86. See Commonwealth v. Lanigan, 641 N.E.2d 1342 (Mass. 1994) (recognizing the risk that reliable evidence might be kept from the fact finder by a strict adherence to Frye, and adopting Daubert).
The State of Alabama applies the Frye standard as its base for admissibility but adds additional standards. The Supreme Court of Delaware determined, in light of Daubert, that the Frye standard was not the sole determination for admissibility of scientific evidence. In fact, the court adopted the Daubert standard, holding that the "evidence must [also] satisfy the pertinent Delaware Rules of Evidence." Indiana adopted a rule identical to Federal Rule 702 but added its own subsection that requires that the expert scientific testimony be based upon reliable scientific principles. The Indiana Supreme Court stated that "Daubert and its progeny, while not binding on issues of Indiana evidence law, are 'helpful' in applying IRE 702(b)." Maryland's Rule 702 requires a court to determine whether (1) the witness is qualified, (2) the testimony is appropriate to the subject matter, and (3) a sufficient factual basis exists to support the expert testimony. However, the Maryland Rules Committee specifically noted "this rule is not intended to overrule . . . cases adopting the principles enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law." Maryland has yet to further develop its law. In Arkansas, the supreme court recently discussed the Daubert standard but relied on a pre-Daubert holding following standards set out in Federal Rules 401, 402, and 702 which had also been accepted by the State. North Dakota applies a Daubert-type standard under that state's Rule 702.

87. See Perry v. State, 606 So. 2d 224, 225 (Ala. Crim. App. 1992) (applying a "Frye-plus" standard of (1) whether underlying theory generally accepted; (2) whether particular techniques at issue are generally accepted; and (3) whether techniques were properly performed by the testing lab). But see Ala. Code § 36-18-30 (1996) (adopting, legislatively, the Daubert standard for admissibility of DNA evidence).


89. Id.


91. Id.

92. See Md. R. Evid. 702.

93. Id. committee note. See, e.g., Schultz v. State, 664 A.2d 60, 64 n.3 (Md. 1995); U.S. Gypsum Co. v. Mayor of Baltimore, 647 A.2d 405 (Md. 1994).


96. See Prater v. State, 820 S.W.2d 429 (Ark. 1991) (rejecting the Frye test and adopting the relevance approach in which reliability is the critical element).

97. See Ark. R. Evid. 401, 402, and 702.

In Hawaii, *Daubert* has had little effect since the Hawaii Supreme Court, prior to *Daubert*, rejected the *Frye* standard as the sole standard of admissibility, and has since followed a *Daubert*-type standard. In so doing, the court wrote, "there are other indicators of suitability for admission at trial" other than the general acceptance standard. The effective language of New Hampshire’s and West Virginia’s Rules of evidence regarding the admission of expert testimony are identical to the Federal Rule. The New Hampshire courts have recognized both the *Daubert* and *Frye* standards, but have not specifically accepted or rejected either. Instead, New Hampshire courts only said that the New Hampshire Rule of Evidence 702 provides the standard. While West Virginia’s Rule is also identical to Federal Rule 702, their courts have concluded that *Daubert’s* analysis of Federal Rule 702 is appropriate and should be followed in analyzing the admissibility of expert testimony under West Virginia Rule 702.

Tennessee rejected *Frye* in 1990 and adopted a *Daubert*-type standard. Utah and Vermont have also adopted the federal approach. The Vermont Supreme Court concluded that "*Daubert’s* general proposition seems sound,’ and that its ‘basic reasoning’ was acceptable, not because the [state] was willing to follow a new trail blazed by the Supreme Court but ‘because *Daubert* is consistent with our test of demonstrated reliability.’" Iowa codified its rule on admission of opinion testimony in 1973 and considers its approach to have been reaffirmed by *Daubert*. Georgia has not specifically

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100. *Montalbo*, 828 P.2d at 1280-81 (Haw. 1992) (concluding that court should weigh general acceptance of scientific theory along with five other factors to determine whether such evidence should be admitted).
103. See Cressley, 628 A.2d at 698.
105. See Tenn. R. Evid. 701.
107. See VT. R. EVID. 702. See also State v. Brooks, 643 A.2d 226, 229 (Vt. 1993) (holding Vermont’s Rules are essentially identical to the Federal Rules on admissibility of scientific evidence and should be applied rather than *Frye*).
adopted Daubert but uses a Daubert-type standard. The Frye standard has been rejected in Ohio in favor of a Daubert-type standard.

Oregon and Wyoming each have adopted the Daubert approach, emphasizing that they had never relied exclusively upon Frye. Similarly, New Mexico abandoned Frye as the exclusive standard in favor of its Rule 702 which is identical to the Federal Rule. The New Mexico court stated that the Frye standard was not a legitimate means for determining what is and what is not scientific knowledge and that it “should be rejected as an independent controlling standard of admissibility.” It may, however, still be considered as a part of making a determination.

3. Some States Use Their Own Interpretation of Federal Rule of Evidence 702

South Carolina, never adopted the Frye standard. The State applies a unique interpretation to its rule of evidence which is identical to Federal Rule 702. Thus, in South Carolina, the Daubert holding will presumably never have any effect. Similarly, Wisconsin rejected the Frye standard in favor of its own relevancy standard and thus is unaffected by Daubert. Rhode Island’s standard considers admitting “evidence of developments in science which assist the trier

111. See State v. Williams, 446 N.E.2d 444 (Ohio 1983) (stating that the trial court is to examine whether the conclusions are reliable with reference to the principles and methods used by the expert witness, and without regard to whether the experts' conclusions are persuasive and correct).
114. See id.
115. See State v. Alberico, 861 P.2d 192 (N.M. 1993) (providing a good discussion of application of Frye as one factor to be considered); N.M. R. EVID. 702.
116. N.M. R. EVID. 702.
118. See id.
119. See Justin S. Kahn, Experts and the New Rules of Evidence, 7-Dec. S.C. LAW 37 (1995) (South Carolina state courts did not rely on Frye before the adoption of the South Carolina Rules Evidence). See State v. Jones, 259 S.E.2d 120 (S.C. 1979) (admissibility of scientific evidence depends on the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and to even generally accepted outside the courtroom); State v. Ford, 392 S.E.2d 781 (S.C. 1990) (recognizing difference between federal courts' use of Frye and South Carolina's more liberal standard set forth in Jones).
120. See S.C. R. EVID. 702.
121. See Kahn, supra note 119 at 38 (South Carolina's Constitution restrains a judge from invading the fact finding role of the jury, citing S.C. Const. art. 5, § 21 (judges shall not charge juries in respect to matters of fact, but shall declare the law)).
122. See Watson v. State, 219 N.W.2d 398, 403 (Wis. 1974).
123. See State v. Peters, 534 N.W.2d 867, 872 (Wis. Ct. App. 1995). The court stated:
The Pennsylvania Supreme Court concluded that *Daubert* did not require it to abolish the *Frye* standard and thus the court left the issue of whether to expressly adopt *Daubert* for another day. The State of Maine also uses a rule of evidence identical to Federal Rule of Evidence 702 and has not addressed the admissibility of scientific testimony since *Daubert* was handed down. Like the Maine courts, Virginia uses a rule of evidence identical to Federal Rule of Evidence 702, and having never adopted the *Frye* test, uses its own common law standard of admissibility. Neither the *Frye* nor the *Daubert* standard has been adopted or even considered in Nevada. Instead, admissibility of evidence is assessed "like other evidence, in terms of its trustworthiness and reliability."}

II. The New Texas Standard

The review of other states' post-*Daubert* evidentiary standards for scientific evidence helps to demonstrate the context from which the Texas Supreme Court decided *Robinson*. The evolution of Texas's common law, has led to the *Robinson* court's adoption of a standard applying a middle of the road approach lying somewhere between the rigid general acceptance standard of *Frye* and the liberal relevancy standard of *Daubert*.

Because Wisconsin rejected the *Frye* test and adopted a test unrelated to that used by the federal courts and many state courts, our standard for the admission of scientific evidence was unaffected by *Daubert*. Thus, the rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is relevant, § 904.01, Stats.; (2) the witness is qualified as an expert, § 907.02 Stats.; and (3) the evidence will assist the trier of fact in determining an issue of fact, § 907.02.

*Id.* (footnotes omitted) (citing State v. Walstad, 351 N.W.2d 469, 486 (Wis. 1984)).

124. State v. Wheeler, 496 A.2d 1382, 1388 (R.I. 1985). Specifically, the court stated:

In this jurisdiction, we have been open to evidence of developments in science that would tend to assist the trier of fact. "This court has never been hostile to the proof of fact by evidence relating to scientific tests or experiments." The law and practice of this state on the use of expert testimony has historically been based on the principle that helpfulness to the trier of fact is the most critical consideration.

*Id.* (citation omitted) (quoting Powers v. Carvaholo, 281 A.2d 298, 300 (R.I. 1971)).


129. *See Santillanes v. State*, 765 P.2d 1147, 1150 n.3 (Nev. 1988) ("In the sixty-five years since *Frye* was decided we have neither cited to nor adopted the decision.").

130. *See id.* at 1150.
A. Past Standards

A look at Texas’s history of admissibility standards reveals that the courts have considered a wide variety of scientific evidence and applied varying standards to the use and exclusion of scientific evidence.131 Prior to the adoption of the Texas Rules of Criminal Evidence, Texas utilized the Frye general acceptance standard in criminal cases. For example, in Jones v. State,132 a nurse was accused of injecting succinylcholine chloride into hospitalized children, causing death.133 An expert testified that a process known as gas chromatography mass spectrometry showed that succinylcholine chloride was present in a child’s tissue.134 Although the court admitted the evidence, its analysis of the Frye standard was critical and suggested a more liberal relevancy approach.135 After Texas adopted a rule identical to Federal Rule 702, the courts continued to apply the Frye standard.136 It was not until the Texas Court of Criminal Appeals considered Kelly v. State137 that it adopted a Daubert-type standard.138


132. 716 S.W.2d 142 (Tex. App.—Austin 1986, pet. ref’d).

133. See id. at 144-45.

134. See id. at 151, 156. (stating that the evidence was admissible because it had attained general acceptance).

135. See id. at 152-54.

136. See Spence, 795 S.W.2d at 752 (considering the admissibility of bite mark evidence); Zani, 758 S.W.2d at 233 (considering the admissibility of hypnotically-refreshed memory).


138. Id. at 573. Factors affecting the trial court’s determination of reliability include:

(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

Id.
Prior to the adoption of the Texas Rules of Civil Evidence, what was known simply as the “general rule,” similar to the general acceptance test, was applied in civil cases. However, after Texas adopted an approach patterned after the Federal Rules, the courts of appeals, like the federal courts, varied on the standards applied. For example, the Dallas and San Antonio Courts of Appeals adopted a liberal relevancy standard, holding that the testimony was admissible if it is based on a “body of scientific, technical, or other specialized knowledge,” and is relevant to the case. In contrast, the Eastland and Houston Courts of Appeals interpreted Texas Rule of Evidence 702 “to require that expert testimony be reliable.” However, the Court of Appeals for the Fifth Circuit continued to use the Frye standard.

The Supreme Court’s pronouncement of Daubert as the appropriate standard failed to align Texas courts under a single standard. Texas courts’ interpretation and application of Daubert varied until the Texas Supreme Court decided Robinson. Beginning in 1994, after Daubert, the Houston Court of Appeals considered but rejected Daubert. In contrast, the Dallas Court of Appeals followed Daubert. The Corpus Christi Court of Appeals initially followed the Houston Court’s lead and rejected Daubert, when it reversed a lower court, and excluded expert testimony proffered by the plaintiff. However, after the supreme court decided Robinson, the appellate court, using a Daubert standard, admitted the testimony on rehear-


140. See Colmenro, supra note 14, at 310.

141. Id. (citing Guentzel v. Toyota Motor Corp., 768 S.W.2d 890, 897 (Tex. App.—San Antonio 1989, writ denied); Vogelsang v. Reece Import Autos, Inc., 745 S.W.2d 47, 49 (Tex. App.—Dallas 1987, no writ) (“[W]e hold that the question of a witness’ qualifications to give expert testimony is . . . for the jury. The court only makes the threshold finding, that the witness possesses minimal qualifications as an expert.”).

142. See id.

143. Id. (citing Thompson v. Mayes, 707 S.W.2d 951, 956 (Tex. App.—Eastland 1986, writ ref’d n.r.e.); Gannett Outdoor Co. v. Kubeczka, 710 S.W.2d 79, 89 (Tex. App.—Houston [14th Dist.] 1986, no writ).

144. See id. (citing Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1115 (5th Cir. 1991) (per curiam)) (“When analyzing the validity of an expert’s methodology, we seek to determine whether it connects the facts to the conclusion in a scientifically valid way. We answer this by applying the Frye test . . . .”).


146. See North Dallas Diagnostic Ctr. v. Dewberry, 900 S.W.2d 90, 95 (Tex. App.—Dallas 1995, writ denied) (“[B]ecause the wording of the applicable Federal Rules is identical to [the Texas’s Rules], we can confidently turn to the federal courts for guidance.”).
The opinion in Robinson removed ambiguities created by the lower courts and provided the standard for Texas.148

B. The New Standard DuPont v. Robinson

C.R. and Shirley Robinson, the plaintiffs in Robinson, sued the E.I. DuPont de Nemours Company for products liability, breach of warranty, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act.149 The plaintiffs complained that a fungicide manufactured by DuPont was contaminated and damaged their pecan orchard.150 The Robinsons' only expert witness was Dr. Carl Whitcomb151 who was a scientist specializing in horticulture, plant ecology, and agronomy.152 Dr. Whitcomb had taught at a research university for thirteen years and was well published in his field.153 Dr. Whitcomb's opinion was that DuPont contaminated the fungicide during its manufacturing process, and that contamination damaged the Robinsons' pecan trees.154 Dr. Whitcomb's most direct cause and effect evidence for his conclusion was based on earlier experiments conducted at the request of a Florida attorney representing clients that were asserting claims similar to the Robinsons'. This earlier experiment included exposure of plants to the suspected contaminate.155 While his experimental procedures were well grounded scientifically, he did not test the Robinsons' trees directly, nor did he test the herbicide they used on the soil around their trees.156

A pre-trial conference was held and the court heard and granted DuPont's motion to exclude Dr. Whitcomb's expert testimony.157 In an analysis that combined the Frye and Daubert standards, the trial court found Dr. Whitcomb's testimony inadmissible158 because it was

147. See Merrell Dow Pharms., Inc., v. Havner, 907 S.W.2d 535, 542 (Tex. App.—Corpus Christi 1994), rev'd, 1997 WL 378060 (Tex. July 9, 1997). The Corpus Christi Court of Appeals reconsidered its decision in light of the Robinson decision adopting Daubert. The court of appeals initially reversed the lower court's decision to admit the plaintiff's expert testimony under Rule 702. However, on rehearing, the court applied the Robinson standard and held that the plaintiff's expert witness did satisfy Rule 702 and upheld the trial court's decision allowing the testimony. See id. at 550.


149. See id. at 550-51.

150. See id. at 551.

151. See id.

152. See id.

153. See id.

154. See id.

155. See id.

156. See id. In fact, there was strong evidence from the analysis of at least 15 other batches of the fungicide that showed that the contaminant was not in all, or even most, of the batches. Thus, it is questionable at the outset whether the batch of fungicide that the plaintiffs used was contaminated, and if so, to what level.

157. See Robinson, 923 S.W.2d at 552.

158. See id.
not the product of reasoned and accepted scientific methods.\(^{159}\) Thus, the court excluded the testimony, concluding it was not reliable and would not "fairly assist the trier of fact in understanding a fact in issue in the case."\(^{160}\) At trial, the Robinsons again attempted to offer Dr. Whitcomb's testimony but the court sustained DuPont's objection.\(^{161}\)

Pursuant to Texas Rules of Appellate Procedure 52(b)\(^{162}\) and Texas Rules of Civil Evidence 103(a)(2)\(^{163}\) the Robinsons filed an informal bill of exception, which included a statement of Dr. Whitcomb's anticipated testimony and the introduction of numerous exhibits.\(^{164}\) However, without Dr. Whitcomb's testimony, the Robinsons failed to meet their burden of proof on the issue of causation, and the court granted DuPont's Motion for a Directed Verdict.\(^{165}\)

The Robinsons appealed the ruling, claiming the trial court abused its discretion by excluding the expert testimony.\(^{166}\) The Fort Worth Court of Appeals reviewed the trial court's Rule 702 inquiry in light of the standards set out in Guentzel v. Toyota Motor Corp.,\(^{167}\) and held that the trial court did abuse its discretion in excluding Dr. Whitcomb's testimony.\(^{168}\) Although the court recognized that "[t]he question of whether a person is an expert witness is a discretionary matter left to the trial court."\(^{169}\) The Court of Appeals wrote:

\(^{159}\) See id. Specifically, the court found that the testimony

(1) was not grounded upon careful scientific methods and procedures; (2) was not shown to be derived by scientific methods or supported by appropriate validation; (3) was not shown to be based on scientifically valid reasoning and methodology; (4) was not shown to have a reliable basis in the knowledge and experience of his discipline (horticulture); (5) was not based on theories and techniques that had been subjected to peer review and publication; (6) was essentially subjective belief and unsupported speculation; (7) was not based on theories and techniques that the relevant scientific community had generally accepted; and (8) was not based on a procedure reasonably relied upon by experts in the field.

\(^{160}\) See id.

\(^{161}\) See id.

\(^{162}\) Tex. R. App. P. 52(b) (Informal Bills of Exception and Offers of Proof).

\(^{163}\) Tex. R. Civ. Evid. 103(a)(2) (Effect of Erroneous Ruling, Offer of Proof).

\(^{164}\) See Robinson, 923 S.W.2d at 552.

\(^{165}\) See id.

\(^{166}\) See id. at 552.

\(^{167}\) 768 S.W.2d 890 (Tex. App.—San Antonio 1989, writ denied).

\(^{168}\) See Robinson v. E.I. DuPont de Nemours & Co., 888 S.W.2d 490, 492 (Tex. App.—Fort Worth 1994), rev'd, 923 S.W.2d 549 (Tex. 1995). Specifically, the court stated:

The expert evaluates the facts and his evaluation must meet three prerequisites: (1) A body of scientific, technical, or other specialized knowledge must exist that is pertinent to the facts in issue; (2) The witness must have sufficient experiential capacity in his field of expertise. This capacity encompasses knowledge, skill, experience, training, and education; and (3) The facts evaluated must be within the witness' field of specialized knowledge.

\(^{169}\) Id. (quoting Guentzel v. Toyota Motor Corp., 768 S.W.2d at 897).
DuPont did not contest Dr. Whitcomb's qualifications, only his methodologies and the research upon which he would base his opinions. He would not have testified as a chemist, but as a horticulturist with a doctorate in horticulture and plant ecology and agronomy who had been conducting research with regard to Benlate. His testimony would have been pertinent to the cause of the damage to the Robinsons' orchard and the connection, if any, of Benlate to that damage.170

The Fort Worth Court of Appeals held that "[i]n light of his qualifications and experience as revealed in the bill of exception, Dr. Whitcomb's testimony was relevant to causation and it was error of the trial court to exclude it."171 The court stated that it was the prerogative of the jury to weigh the credibility of the expert witness, and found harmful error in the trial court's decision to exclude the testimony of Dr. Whitcomb.172 DuPont appealed to the Texas Supreme Court.

The Texas Supreme Court granted DuPont's application for writ of error and for the first time since the adoption of Rule 702 of the Texas Rules of Evidence addressed the proper standard for the admission of expert testimony.173 DuPont, on appeal, argued that "under the court of appeals' restricted guidelines, the trial judge is not a gatekeeper but an idle spectator rendered powerless to ensure the integrity of courtroom evidence."174 DuPont urged the court to adopt a reliability standard similar to the standards applicable to Rule 702 of the Federal Rules of Evidence and the corresponding Texas Rules of Criminal Evidence.175 The Texas Supreme Court adopted DuPont's proposed standard and held that Dr. Whitcomb's testimony and opinions were not reliable, thereby affirming the judgment of the trial court.176

In reaching this conclusion, the court first addressed the status of admissibility standards of experts and their testimony.177 In the Robinson opinion, Justice Gonzalez identified the first problem with expert testimony as "professional expert witnesses are available to render an opinion on almost any theory, regardless of its merit"178 and that "while many of these experts undoubtedly hold reliable opinions which are of invaluable assistance to the jury, there are some experts who are more than willing to proffer opinions of dubious value for the

170. Id. (emphasis added).
171. Id. at 492-93 (citation omitted).
172. See id. at 493.
174. Id. at 554.
175. See id.
176. See id. at 560.
177. See id. at 554-56.
178. Id. at 553 (citing Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639, 644 (7th Cir. 1986)).
proper fee."179 Expressing concern about the "extremely prejudicial impact" experts may have on a jury because of the perception the jury has of the witness as an expert,180 Justice Gonzalez then identified a second dilemma, the difficulty in evaluating the scientific evidence, and stated that "[j]urors are often expected to understand complex testimony regarding arcane scientific concepts and are even asked to resolve issues on which the experts cannot agree."181 Justice Gonzalez concluded that this increase in the use of experts and the likely prejudicial impact of their testimony on a jury gives the trial judge a "heightened responsibility to ensure that expert testimony show some indicia of reliability"182 thereby calling for the reliability standard urged by DuPont.183

The court was "persuaded by [each Court's] reasoning in Daubert and Kelly."184 Therefore the court held that Texas Rules of Evidence mandate that the proponent of expert testimony show that the testimony is both reliable scientifically and relevant.185 To meet the necessary elements of the test, the court stated that "to constitute scientific knowledge which will assist the trier of fact, the proposed testimony must be relevant and reliable."186 The court then set out six non-exclusive factors to be considered in making the threshold determination of admissibility of expert testimony under Texas Rule of Evidence 702:

1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies upon the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;
5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. the non-judicial uses which have been made of the theory or technique.187

The court added that each case will present unique factors that will be helpful in satisfying the need for scientific reliability.188 Thus, the guidelines set forth by the court in Robinson are not exclusive.

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179. Id. (quoting 2 Steven Goode, et. al., Guide to the Texas Rules of Evidence: Civil and Criminal § 702.2, at 17 (Texas Practice 2d ed. 1993)).
180. See id.
181. Id. (quoting Brock v. Merrell Dow Pharms., Inc., 874 F.2d 307, 309 (5th Cir.), modified, 884 F.2d 166 (5th Cir. 1989), cert. denied, 494 U.S. 1046 (1990)).
182. Id.
183. See id. at 554.
185. See Robinson, 923 S.W.2d at 556.
186. Id.
187. Id. at 557.
188. See id.
III. Robinson's Effect

The thrust of Robinson was to establish some guideline or method for keeping “kitchen chemistry” and “junk science” out of the consideration of judge and jury. The Texas Supreme Court relies on the idea that a certain degree of methodology will accomplish this end.

One concern in applying scientific methodology in the courtroom, however, is a rift between the method in law and the method in science. As for the law, the rules of procedure are well thought-out, planned, re-planned, applied, re-applied, and steeped in time and tradition. Therefore, the judge is not required to design new and innovative trial procedures or evidentiary standards. The scientific community has a different structure and methodology of accomplishing scientific goals and principles. It relies on the scientific method which includes the gathering of data, the testing and re-testing of hypotheses, and the question of falsifiability. Science involves trained theorists and researchers. It is these people who make the decisions about what theories to apply, what subjects to research, what methods to use, and what constitutes acceptable scientific endeavor. The difference is that the process of science leads to something new while the process of law is most comfortable when it deals with something old — stare decisis. Therein lies the conflict.

Probably the thorniest problem surrounding expert proof centers on a court’s scrutiny of an expert opinion to determine if the expert’s reasoning and methodology are scientifically valid. One author suggests a judge consider the following questions:

(1) Under what circumstances can judges with limited scientific expertise exclude an expert’s opinion because of flaws in the scientific reasoning or methodology on which it rests? The expert, after all, is an expert precisely because he or she has specialized knowledge that a nonexpert in the relevant field lacks.
(2) When is scientific validity a question of law for the court rather than a question of fact to be resolved by the trier of fact?
(3) When will a lack of scientific validity result in the inadmissibility of expert testimony, and when will it lead to a finding of insufficiency?

These questions are difficult to answer.

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189. See Robinson, 923 S.W.2d at 554. Invalid science is termed “junk science.” Junk science is trial testimony provided by experts that is not supported by the scientific method, valid data, and the standard scientific thinking. Peter W. Huber, Galileo’s Revenge 2 (1991).
190. See Robinson, 923 S.W.2d at 554.
191. See Daubert, 509 U.S. at 593.
193. Id.
A second issue arises regarding the interaction of the Daubert standard and Rule 703. According to the United States Supreme Court, federal courts are to use a standard of scientific reliability and relevance to exclude expert testimony.194 It has been suggested that Daubert reclassified issues under Rule 702 that some federal courts had classified under Rule 703.195 In Daubert, the Supreme Court seemed to "acknowledge Rule 703's role as an independent source for excluding expert testimony."196 Subsequently, a new question arises as to whether an expert's data used to draw his conclusions must be one "reasonably relied upon" by other experts. As the Ninth Circuit observed on remand of Daubert "[f]ederal judges ruling on the admissibility of expert scientific evidence face a far more complex and daunting task in a post-Daubert world than before."197 Suggestions as to this change in a judge's approach are set out in The Reference Manual on Scientific Evidence which suggests, among other things, that both an expert's failure to consider data and an expert's consideration of data that other experts would exclude should be taken into account and weighed when considering the relevancy and credibility of the expert and his testimony.198 However, Daubert does not address these concerns. Thus, the following issues remain unresolved:

May a court rely on Rule 703 to exclude an expert's opinion that reaches a conclusion that is inconsistent with a scientific consensus or that lacks a scientific foundation? Does such a reading constitute a back-door resurrection of the Frye "general acceptance" test, which was rejected by the Court as incompatible with the Federal Rules of Evidence? Should a court use a sufficiency analysis rather than an admissibility analysis when an expert uses an appropriate methodology and relies on data that experts reasonably rely upon but nevertheless reaches an opinion at odds with the scientific community?199

Prior to Texas's adoption of Daubert, the Texas Rules of Evidence provided no specific guidelines for determining what level of skill, knowledge, or experience was required of a particular witness who is

194. See Daubert, 509 U.S. at 587-91.
195. See Reference Manual supra note 192, at 104. Rule 703 lists the basis on which an expert may base her testimony. These include facts perceived or made known at or before the hearing and are the type of facts reasonably relied upon by experts in the particular field. See Fed. R. Evid. 703.
196. See Reference Manual supra note 192, at 105. See also Daubert, 509 U.S. at 595 (Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."").
197. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311 (9th Cir. 1995).
199. Id. at 111-12.
to testify as an expert. In fact, the standard was amorphous, ambiguous and thus open to broad interpretation and application. This standard was propagated by a reluctance to question a trial court’s determination. A trial court’s ruling regarding admissibility of expert testimony was protected by an ambit of discretion. In Lujan v. Tampo Manufacturing Co., the court stated that it is within the trial court’s discretion to admit testimony, and that decision will not be reversed on appeal “absent a clear abuse of discretion.” Some Texas courts aptly defined the problem of expert testimony before the adoption of Daubert as unsupported scientific reasoning amounting to speculation and is thus insufficient to admit as evidence. Then, along came Robinson and told judges what may be sufficient in that regard. However, this new standard is not without its critics and problems with its application.

A. The New Standard May Reduce Frivolous Litigation

A unified standard of admissibility is only one benefit of the Robinson decision. The decision may also provide the courts with an additional method to handle frivolous litigation. Until the gatekeeper function was articulated, the weight to be given the opinion testimony of a credentialed expert was up to the jury. Rigorous cross-examination was deemed a sufficient safeguard, and the jury acted as a buffer between faulty opinions and a favorable verdict. Now, there is an additional safeguard of gatekeeping which, if used carefully, could be an effective weapon in the war against frivolous litigation.

Guarding against frivolity is an important function of the trial court in discharging the responsibility of gatekeeper. However, in light of Robinson, the unreliable nature of an opinion must be obvious before it is excluded. It is in this way the frivolous claim or defense will be impacted. If the trial judge believes the evidence may indeed be reliable, the question should be resolved by letting the jury, after rigorous cross-examination either accept and consider the opinion or reject it. If on the other hand, the authority to exclude an opinion witness rests solely with a trial judge he or she becomes the sole influence on the outcome of a case. The uncertainty of whether an expert’s testimony will reach the jury will give litigants an additional factor to consider in determining whether to file an action. This factor could reduce needless suits, and allow judges an opportunity to control and manage frivolous litigation.

201. 825 S.W.2d 505 (Tex. App.—El Paso 1992, no writ).
202. Id. at 509.
203. See Maritime Overseas Corp. v. Ellis, 886 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.).
204. See E.I. DuPont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 560 (Tex. 1995).
B. Strategy of the Expert’s Proponent

Unlike the lawyers, the one whose chair faces the back of the courtroom has the luxury of being immune from the outcome of a trial. While strategy and success guide those at the counsel table, the judge has no interest in who wins. The judge’s role is to ensure that no party has an undeserved advantage. The lawyers and litigants must make the final decision regarding the risk of beginning suit.

While the problems of challenging an expert’s testimony can be solved by imposing a pre-trial order, an attorney’s litigation strategy may be sacrificed. Thus, the gatekeeping role takes on an ominous importance in determining what advocates are likely to face when they seek to win the whole war by fighting only one battle. Strategists may question whether there is really any incentive for an advocate to raise a Robinson challenge early if the opponent is to be given an opportunity to cure.

For example, as to pleadings defects; if a special exception is sustained there is generally an opportunity to amend the pleading to address the objection. Otherwise, an advocate would wait until trial and raise an objection to a vague paragraph in an opponent’s pleading and, if such objection is sustained, the case could be thrown out. Such was the case in ancient times when pleadings were an art form. Such is not the case today. Currently, such an objection to a pleading is waived unless a timely exception is made and ruled on.

Those who have no interest in who wins care little for rules and procedures that give one party an advantage without reference to the merits of the case. “Gatekeeping” is no different, and “gotcha” is an inappropriate response from those cast in the role of impartial adjudicator, whether judge or jury.

The Texas Supreme Court has yet to address the problems inherent with the timing of the Robinson challenge. Frequently, parties wait to designate experts until shortly before the trial date with formal supplementation discovery requests. It is then that key experts are revealed so that depositions may be set. It remains uncertain whether the adversary should challenge the witness when revealed, and pre-trial testimony taken, or wait for the day of trial.

Such strategy is sound only to the attorney trying, at any cost, to gain every possible advantage. Such challenges present a strategic question of whether it is proper, courteous, or ethical for one party to lay behind a log, waiting to spring the trap at trial. Also is the ques-

205. A pre-trial order may be imposed, setting, in addition to pleading and discovery deadlines, a deadline for challenging experts. See TEX. CIV. P. 166 (a judge may establish a pre-trial calendar by local rule); But see FED. CIV. P. 16(b) (mandating pre-trial scheduling order).
207. See TEX. R. CIV. P. 166b(2)(e); 166b(6)(b).
tion of whether we will see litigation tactics develop and become accepted where both sides wait until the eleventh hour to raise a Robinson challenge to strike the experts. Traditional principles of professional responsibility embodied in the Lawyer's Creed require lawyers to be courteous, candid, and cooperative in their dealings with one another. An interest in effective litigation tactics, however, suggest the temptation will be to wait until the last minute to raise a challenge, and rationalize such strategy under the guise of aggressive representation of a client.

Understandably, the public has grown tired of tactics and attitudes that do little more than increase the costs of litigation. Local rules, pre-trial orders, codes of ethics, and even sanctions have been used to curb such behavior. Although an eleventh hour Robinson challenge is permitted under the Texas Rules, we should not sacrifice fairness and courtesy.

If an eleventh hour Robinson challenge is sustained, it can be devastating. Where the challenge is in the form of a Motion in Limine and is made on the morning of trial, it may be too late for the challenged party to respond unless a continuance is granted. If a challenge is made when the expert is called to the stand, nothing short of a mistrial would allow a cure. On the other hand, if the grounds for the challenge develop as a result of cross-examination during trial, then that is properly left for the jury. All things considered, the end result of a late challenge is that a jury trial becomes a trial to the court on the issue of whether to allow the expert to testify, and that decision is solely within the judge's discretion. To avoid such a result, a pre-trial scheduling order should include a deadline for raising an objection to an expert witness, and the deadline should allow sufficient time for the parties to cure the defect where appropriate. Hence, without an adequate opportunity to cure, the only likely results of an eleventh hour challenge are delay, inconvenience, and injustice.

C. The Standard of Review—Appeals

Clearly, part of a trial judge's job is to prevent unfairness by excluding certain evidence before it is heard. When reviewed by the courts of appeals, a trial judge's discretionary rulings are evaluated to determine if there was an abuse of that discretion. The Texas Supreme Court has held "the test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and

208. See The Texas Lawyer's Creed—A Mandate for Professionalism (West's Texas Rules of Court 1997).
209. Allowing the challenged party some means of searching out and hiring another expert who will meet the Robinson criteria is one possible cure.
principles." 211 In the past, the Texas Supreme Court also described the test as a decision of "whether the act was arbitrary or unreasonable." 212 Furthermore, the court in Robinson stated that "the mere fact a trial court may decide a matter within its discretionary authority in a different manner than an appellate court in a similar circumstance does not demonstrate that an abuse of discretion has occurred." 213

These decisions highlight the fact that rulings on evidence are largely left to the broad discretion of the trial judge, and as gatekeepers, the decision to exclude testimony will be upheld unless done in such a way as to suggest the applicable standards, flexible as they are, were ignored. 214 Even if the reviewing court thinks the conclusion reached by the judge showed poor judgment, it is not free to substitute its judgment if there is a record that the proper criteria were considered in making the decision to admit or exclude. 215 Such is the abuse of discretion standard. The practical effect of this standard means that the decision to exclude testimony, as long as the Robinson factors were considered, is likely to be upheld.

As became evident when the Robinson's expert's opinion on causation was rejected, such a ruling may be outcome determinative. 216 When the defect in the expert's testimony is incapable of being rectified, no matter when the challenge is made, striking the expert is proper. However, where redemption or substitution of the expert is an option, the court should require the parties to raise the issue early enough in the process to allow for rectification or curing. There is nothing in Texas case law that would indicate the gatekeeper's comment should be "gotcha" because the gatekeeper is not allowed to care who wins.

The chances of the trial judge sustaining a challenge to an expert, resulting in the expert being struck, go down dramatically if the ruling will take the case away from the jury. One very obvious reason for this is that there is seldom any good reason to build in a point of error when a jury verdict will end the case without the incentive to appeal. For example, a plaintiff attempting to connect his injury to the design of a product may want to use unreliable opinion testimony. The judge, during trial, has two choices. Exclude the testimony and

213. Id.
215. See Downer, 701 S.W.2d at 241-42.
216. See Robinson, at 551-52 (excluding Robinson's sole expert).
217. To say "build in a point of error" is in no way an indication that such would be error. Giving a party a point of error just gives them something to take up on appeal. We previously discussed how difficult it is to reverse a ruling on evidence left to the sound discretion of the trial judge where it is shown that all Robinson factors were considered.
force an appeal or let the testimony in and see if the jury rejects the opinion. The outcome in the trial court is likely the same: the plaintiff loses. In one situation there is an almost automatic appeal. In the other, an appeal is much less likely because the plaintiff knows it had a fair opportunity to present the evidence. It may be, thus, better to let the expert testimony go before the jury rather than make a questionable gatekeeping decision and send them home.

Jurors give freely of their time to help us further the goals of the justice system. To ask twelve people to spend time in court and then send them home before they effectively participate in the trial undermines our system of justice. To avoid such a result, the trial judge should keep the gate before the trial begins and where appropriate, the problem can be identified and cured, so when the jury ultimately hears the case, they will hear the whole case and have an opportunity to weigh all of the evidence and make their decision on that evidence.

III. Conclusion

It is still too early to predict how often the trial judges will have to don the evidence police hat. Nevertheless, we do know that putting an early end to the litigation of cases that do not warrant the cost involved will be welcomed by all. On the other hand, it is likely that a gatekeeper's balancing between fairness to litigants and allowing them to present their evidence at trial will increase the certainty of sending the trial judge's decision to the local court of appeals. Such is the situation of Texas judges as gatekeepers under the new standard.