TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 12 | Number 2 Article 22

1996

Rule 702: Testimony by Experts

RULE 702: TESTIMONY BY EXPERTS

Federal Rule of Evidence 702 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.[1]

Rule 702 allows properly qualified experts to testify, in the form of opinions or dissertations on a particular subject, in order to assist the trier of fact in evaluating difficult scientific, technical or other specialized evidence.[2] Under Rule 702, a witness can be qualified as an expert if he or she possesses "scientific, technical, or other specialized knowledge" gained through "knowledge, skill, experience, training, or education."[3] Thus, "[w]here an expert has the education or background to permit him to analyze a given set of circumstances, 'he can through reading, calculations, and reasoning from known scientific principles make himself very much an expert . . . even though he has not had actual experience . . . . "[4] Moreover, courts have recognized that when determining whether a witness should be qualified as

---

1. FED. R. EVID. 702.
2. FED. R. EVID. 703 advisory committee's note.
3. FED. R. EVID. 702.
4. Lappe v. American Honda Motor Co., Inc., 857 F. Supp. 222, 226-27 (N.D.N.Y. 1994). In this products liability action arising out of an automobile accident which left plaintiff driver permanently quadriplegic, the court certified Dr. James Pugh, as an expert witness qualified to testify as to the design of the automobile in question. *Id.* at 224, 226. The court determined that

> Although [Dr. Pugh] does not design automobiles for a living, this expert is a Registered Professional Engineer in the State of New York, and holds degrees in metallurgy & material science and biomedical engineering. He is also a member of several professional societies. Since plaintiff's expert has experience in accident reconstruction and analysis of vehicular accidents, he clearly "possess[es] skill or knowledge greater than the average layman" regarding the matter before this court.

Id. at 227 (citations omitted). Thus, the court qualified Dr. Pugh as an expert witness under Rule 702 "on the basis of his credentials and experience." *Id.* at 227.

an expert, a certain degree of "liberality and flexibility" should be employed.[5] However, an expert is subject to certain limitations, therefore, his or her testimony must "stay within the confines of [the expert's] subject area, and [the expert] cannot render [an] expert opinion on an entirely different field or discipline."[6]

Upon determining that a witness possesses the necessary credentials to qualify as an expert under Rule 702, there is a further inquiry which must be considered. This inquiry must determine whether the expert's testimony will "aid the trier of fact in his search for the truth" so as to be rendered admissible.[7] It has been held that where there are questions concerning the helpfulness of expert testimony to a trier of fact, these should be answered "in favor of admissibility."[8] In Lappe v. American Honda Motor Co.,[9] the United States District Court for the Eastern District of New York, after qualifying a witness as an expert, determined that since the facts involved in the products liability case were of a technical nature, "[t]he expert's reports and testimony would assist the trier of fact in its determination of whether plaintiff's 1984 Honda Civic had a substandard design . . . [and] whether such a design contributed, in any way

---

5. *Id.* at 227.

6. *Id.* at 227 (citations omitted).

7. *Id.* at 226 (citations omitted). *See, e.g.*, United States v. Gallo, 118 F.R.D. 316, 317 (E.D.N.Y. 1987) (finding that testimony of an expert witness concerning the methodology of organized crime should be allowed in to assist the trier of fact because the "average jury . . . is likely to know very little about the methods of operation of organized crime . . . [and i]n order to conduct a trial it is necessary that the trier of fact ha[ve] a great deal of familiarity with the way the relevant institution or organization operates"); *But compare*, Boyles v. American Cyanamid Company, 796 F. Supp. 704,709 (E.D.N.Y. 1992) (holding that the testimony of two expert witnesses concerning the causal relationship between the birth defect of a child and chemical exposure of the birth mother, amounted to bare conclusory allegations . . . lacking the indicia of reliability that would cause it to assist a trier of fact").

8. In re Agent Orange Product Liability Litigation, 611 F. Supp. 1267, 1279 (E.D.N.Y. 1985). *See also*, *Lappe*, 857 F. Supp. at 226.

9. 857 F. Supp. 222 (E.D.N.Y. 1994). *See also supra* note 2.

to plaintiff's accident and injuries."[10] Therefore, as exemplified in *Lappe*, an expert witness is a witness capable of "draw[ing] inferences from the facts which a jury would not be competent to draw."[11]

Once a witness is qualified to testify as an expert and the expert testimony is conducive to aiding a trier of fact; the court must look at the content of such testimony to determine its admissibility.[12] Prior to the enactment of the Federal Rules of Evidence, the admissibility of expert testimony in many federal courts was governed by the "general acceptance" test set forth in *Frye v. United States*.[13] The *Frye* test required expert testimony based on scientific principles or practices to be "generally accepted" within the relevant and specific field of study in order to be admissible.[14] Since the promulgation of the Federal Rules

---

10. *Id.* at 226.

11. MCCORMICK ON EVIDENCE, § 13 at 21 (John William Strong ed., 4th ed. 1992). In fact, even if a jury would be competent to draw inferences from the facts, the language embodied in Rule 702 allows testimony of an expert witness as to specialized knowledge if it will be helpful to a jury to determine a fact in issue or understand the evidence already presented. *Id.*

12. *Id.* "There is also the question of whether opinion evidence is admissible if the court believes that the state of the pertinent are or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert." *Id.*

13. 293 F. 1013, 1014 (D.C. Cir. 1923). *See* JACK. B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03], at 43 (Joseph M. McLaughlin ed., 1995). Although *Frye* was a decision made in the Court of Appeals for the District of Columbia and therefore did not have precedential value in other districts, the standard it pronounced was adopted by many other federal courts. *See* KENNETH S. BEOUN, ET. AL., MCCORMICK ON EVIDENCE 363 (John William Strong, ed., 4th ed. 1992).

14. *Frye*, 293 F. at 1014. According to the *Frye* test:

> 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

in 1975, courts have questioned whether Rule 702 incorporated the *Frye* test or whether Rule 702 superseded the *Frye* test.[15] This question was answered in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[16] where the Supreme Court held that Federal Rule of Evidence 702 superseded the *Frye* test.[17] The Court stated that the basic thrust of the Federal Rules of Evidence is liberal, whereas the "general acceptance" standard is rigid, and thus, the two are incompatible.[18] The Court put forth a new

---

> established to have gained general acceptance in the particular field in which it belongs.

Id.

15. *See* WEINSTEIN & BERGER, *supra* note 30, ¶ 702[03], at 44-45. After the enactment of the Federal Rules of Evidence in 1975, the Sixth, Seventh and Ninth Circuits, as well as the District of Columbia Circuit, continued to use the *Frye* standard, the Fourth and the Eighth Circuits did *not* use the "generally accepted" standard of *Frye*, while both the Second and the Third Circuits used *Frye* in some cases but refused to use it in others. *See* WEINSTEIN & BERGER, ¶ 702[03], at 44-45, nn. 5-7.

16. 113 S. Ct. 2786 (1993). On behalf of two infant children, their guardians ad litem brought suit against Merrell Dow Pharmaceuticals to recover for limb reduction birth defects allegedly sustained, to the children, as a result of the mother's prenatal ingestion of an anti-nausea drug known as Benedictin. *Id.* at 2789. Petitioners sought to proffer evidence in the form of testimony from eight experts, each of whom concluded that Benedictin can cause birth defects. *Id.* at 2789-90. The trial court and court of appeals determined that such evidence did not meet the applicable "general acceptance" standard as enunciated in *Frye* for the admission of expert testimony since the expert testimony was not "based on scientific technique[s] that were 'generally accepted' as reliable in the relevant scientific community." *Id.* at 2790. However, the Supreme Court held that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial. *Id.* at 2794. Therefore, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 2795. The Supreme Court remanded the case for further proceedings using the correct standard outlined in Rule 702. *Id.* at 2799.

17. *Id.* at 2793.

18. *Id.* at 2794. *Frye* is said to be rigid in that "the proponent of the evidence must prove general acceptance, by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists." MCCORMICK ON EVIDENCE, *supra* note 30, at 363.

standard which required that any scientific testimony or evidence must be both relevant and reliable in order to be admissible.[19]

In *Daubert*, the Supreme Court set forth a number of considerations for determining the admissibility of expert testimony at the trial level.[20] First, the trial court should determine whether the expert testimony or evidence sought to be admitted can be and has been tested.[21] Second, an inquiry should be made as to whether the testimony has been subjected to peer review and publication.[22] Third, the court should consider the known or potential rate of error of the test or technique sought to be admitted.[23] Finally, the court may evaluate whether the content of the testimony is generally accepted in the relevant scientific community pursuant to the *Frye* test.[24] Thus, whereas the *Frye* general acceptance test was at one time the controlling factor in determining the admissibility of scientific evidence, it is now just one of several factors to be considered under Rule 702.[25]

When such expert testimony is sought to be introduced, the trial judge must act as a "gatekeeper" for determining whether evidence is relevant and reliable.[26] Acting in this capacity, the trial judge, pursuant to Rule 104(a),[27] must make a "preliminary

---

19. *Id.* While acknowledging that Rule 702 applies to "technical or other specialized knowledge," the Court limited its holding to scientific knowledge. *Id.* n.8.

20. *Id.* at 2796-97. The factors which the Court enumerates are illustrative and not an exclusive list. *Id.* at 2797 n.12

21. *Id.* at 2796.

22. *Id.* at 2797.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 2796.

27. FED. R. EVID. 104(a). Rule 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Id.

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."[28] Having made such an assessment, the trial judge must then rule on whether the testimony, pursuant to Rule 702, would aid the trier of fact in understanding the evidence or establishing a fact in issue.[29] In making this determination, the trial judge may consider evidence that would otherwise be inadmissible.[30] However, the trial judge is still bound by the Federal Rules on privileges.[31]

In New York, the *Frye* general acceptance test is still the standard for admissibility of expert scientific testimony.[32] In *People v. Wesley,*[33] the New York Court of Appeals recently affirmed the use of the "general acceptance" standard[34]and, in a

---

28. *Daubert*, 113 S. Ct. at 2796.

29. *Id.*

30. *See* FED. R. EVID. 104(a).

31. *Id.*

32. *See* People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994) (holding that DNA profiling was "generally accepted" as reliable by the relevant scientific community and was therefore admissible); People v. Taylor, 75 N.Y.2d 277, 287-88, 552 N.E.2d 131, 135, 552 N.Y.S.2d 883, 887 (1990) (holding the evidence of rape trauma syndrome admissible because it was generally accepted within the relevant scientific community).

33. 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994). Here, the defendant appealed his convictions of murder in the second degree, rape in the first degree, attempted sodomy in the first degree, and burglary in the second degree, of a seventy-nine year old woman. *Id.* at 420, 633 N.E.2d at 453, 611 N.Y.S.2d at 99. The defendant contended that the use of DNA profiling evidence was not "generally accepted as reliable by the relevant scientific community," thus rendering such evidence inadmissible. *Id.* at 424, 633 N.E.2d at 455, 611 N.Y.S.2d at 101. However, the court ruled to the contrary, holding that "[t]here was sufficient evidence in the record to support the hearing court's determination on general reliability as a matter of law and, second, the determination comported with generally accepted scientific authority." *Id.* Thus, "since DNA evidence was found to be generally accepted as reliable by the relevant scientific community and since a proper foundation was made at trial, DNA profiling evidence was properly admitted at trial." *Id.* at 425, 633 N.E.2d at 455, 611 N.Y.S.2d at 101.

34. *Id.* at 422-23, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.

footnote, rejected the federal application of the *Daubert* rule.[35] The court stated that the focus of an admissibility inquiry must be on the acceptance of the reliability of the evidence by the relevant scientific community, and that such expert testimony based on scientific principles is admissible "only after the principle or procedure has gained general acceptance in its specified field."[36] In *Wesley*, the court held that DNA evidence was "generally accepted as reliable by the relevant scientific community," and, accordingly, the evidence was properly admitted at trial.[37]

The difference between the *Frye* test as applied in New York and the *Daubert* test utilized in federal courts lies in what the focus of the trial judge is when he or she is determining the admissibility of scientific evidence. "*Frye v. United States* poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally."[38] This determination, which is based *solely* on the opinion of the relevant scientific community, is a more stringent test than the flexible approach of Rule 702.[39] The reliability approach of the federal courts does not reject the general acceptance test *per se*, but rather rejects it as the *exclusive* test and instead only considers it as a factor.[40]

35. *Id.* at 423 n.2, 633 N.E.2d at 454 n.2, 611 N.Y.S.2d at 100 n.2.
36. *Id.* at 422-23, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.
37. *Id.* at 425, 633 N.E.2d at 455, 611 N.Y.S.2d at 101.
38. *Id.* at 422, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.
39. *Daubert*, 113 S. Ct. at 2794-95.
40. *Id.* at 2796-97. See *supra* notes 37-42 and accompanying text.