Notre Dame Law School
NDLScholarship

Journal Articles Publications

2004

The Trial Court's Gatekeeper Role under Frye, Daubert, and Kumho: A Special Look at Children's Cases

John Eric Smithburn
Notre Dame Law School, john.e.smithburn.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Criminal Procedure Commons, and the Juvenile Law Commons

Recommended Citation

John E. Smithburn, *The Trial Court's Gatekeeper Role under Frye, Daubert, and Kumho: A Special Look at Children's Cases*, 4 Whittier J. Child. & Fam. Advoc. 3 (2004-2005).
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/391

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE TRIAL COURT'S GATEKEEPER ROLE UNDER *FRYE, DAUBERT*, AND *KUMHO*: A SPECIAL LOOK AT CHILDREN'S CASES

J. ERIC SMITHBURN*

INTRODUCTION

The typical requisites for receiving testimony from an expert witness are that the expert be qualified in a particular subject or area of expertise, that the expert testify in opinion form or otherwise, which will help the fact finder, and that there be a proper basis for the expert's testimony. This article examines the changing meaning in the law of evidence of the expert's subject area in cases involving children. During most of the last century, where the expert witness proposed to testify concerning a new or novel scientific system, process or technique, the court applied the rule of *Frye v. U.S.*[1] to determine the reliability of the subject matter. The *Frye* test requires the court to determine whether the new scientific process is generally accepted in the scientific community to which it belongs.[2] In other cases involving experts, the courts have been left to determine, in the exercise of discretion, whether they feel comfortable putting a particular subject in front of the jury or admitting the evidence in a bench case. Since most experts do not testify about evidence derived from a novel scientific system or technique, the courts in most cases have applied the

* Professor of Law, Notre Dame Law School; Senior Judge, St. Joseph Probate Court (Indiana).

1. 293 F. 1013 (D.C. Cir. 1923).
2. *Id.* at 1014.

traditional rules, which apply to expert witness testimony.[3] As a rule, most of the new or novel "scientific evidence" was derived from the physical or hard sciences. In *Daubert v. Merrell Dow Pharmaceuticals*,[4] the U.S. Supreme Court held that the Federal Rules of Evidence and not *Frye* determine the admissibility of scientific evidence in the federal district courts.[5] Under *Daubert*, the court must make a preliminary assessment of whether the reasons (principles) or methods (techniques) are scientifically valid (reliable) and can be properly applied to the facts of the case.[6] *Daubert* provided a list of preliminary considerations for the trial court judge to use in deciding whether to admit the evidence.[7] The Supreme Court clarified its *Daubert* decision in *Kumho Tire Co. v. Carmichael*,[8] by extending the *Daubert* analytical framework and list of factors beyond scientific knowledge to cases involving technical or other specialized knowledge.[9] Thus, *Kumho* directs the federal district court to consider the *Daubert* factors, and others as necessary, with every expert witness.[10] While the federal law is developing along the lines of *Daubert* and *Kumho*, the states are taking various approaches to expert testimony. Some jurisdictions continue to adhere to the *Frye* rule, others have embraced *Daubert* but not *Kumho*, some states have adopted both *Daubert* and *Kumho*, and other state jurisdictions have developed their own tests with respect to scientific, technical, or other specialized knowledge described by experts. This article analyzes these various approaches, with special emphasis upon the proliferation of non-traditional, soft psychological evidence, which frequently is at the center of cases involving children.

RELIABILITY – THE LAW'S MAIN HISTORICAL CONCERN WITH NEW OR NOVEL SCIENTIFIC EVIDENCE

In the interest of a fair trial to all of the parties, the court's initial concern when an expert witness is called to testify is whether the

3. *See* Fed. R. Evid. 702-706 (2004).
4. 509 U.S. 579 (1993).
5. *Id.*
6. *Id.* at 580.
7. *Id.* at 593-594.
8. 526 U.S. 137 (1999).
9. *Id.*
10. *Id.* at 138.

subject matter is reliable enough to put in front of the fact finder. This matter is of particular importance in jury trials, where the court is concerned about the risk that the jury may regard scientific evidence with a mystic aura of infallibility.[11] To the extent that the court is concerned about the reliability of a novel scientific technique, a hearing is required to determine the reliability of the evidence. Often, the court feels comfortable putting the subject in front of the jury and denies the opponent's motion for a hearing to determine reliability. Courts over the years have made these reliability determinations on an ad hoc basis with little guidance as to what is new or novel and what is "scientific evidence," and there is little consistency from one jurisdiction to another as to the answers to these questions. For example, the following are subjects which courts have determined are appropriate for expert witness testimony without a hearing to determine reliability (pursuant to *Frye* or *Daubert*): testimony of qualified experts as to why a child would cooperate with an adult who had been sexually abusing the child;[12] use of a colposcope to diagnose sexual abuse;[13] "DNA fingerprinting" to determine paternity in an adoption case;[14] podiatrist testimony linking the accused to shoes;[15] eyewitness identification;[16] confusional arousal syndrome;[17] dog sniff evidence;[18] facilitated communication used by a child welfare agency to assist an autistic child to testify;[19] anatomically correct dolls;[20] probability extrapolation to determine the amount of cocaine contained in bricks too numerous to individually analyze;[21] forensic document examination (more "skill" than "science," therefore it does not have to meet the *Daubert* criteria);[22] dog tracking evidence;[23] statistics-based models;[24] and

11. *See People v. McDonald*, 37 Cal. 3d 351, 367-368 (1984), *overruled*, *People v. Mendoza*, 23 Cal. 4th 896 (2000).

12. *State v. Bailey*, 365 S.E.2d 651, 655 (N.C. App. 1988).

13. *People v. Mendibles*, 199 Cal. App. 1277, 1295 (2d Dist. 1988).

14. *In re Baby Girl S.*, 523 N.Y.S.2d 634, 637 (1988).

15. *State v. Hasan*, 534 A.2d 877, 881 (Conn. 1987).

16. *McDonald*, 37 Cal. 3d at 376.

17. *People v. Cegers*, 7 Cal. App. 4th 988, 1000-1001 (4th Dist. 1992).

18. *People v. Sommer*, 16 Cal. Rptr. 2d 165, 174 (Cal. App. 6th Dist. 1993).

19. *See In re Luz P.*, 595 N.Y.S.2d 541, 546 (1993); *State v. Warden*, 891 P.2d 1074, 1093-1094 (Kan. 1995).

20. *People v. Giles*, 635 N.E.2d 969, 977 (Ill. App. 1994).

21. *People v. Peneda*, 32 Cal. App. 4th 1022, 1030 (4th Dist. 1995).

22. *U.S. v. Starzecpyzel*, 880 F. Supp. 1027, 1048 (S.D.N.Y. 1995) [a pre-*Kumho* decision].

dissociative amnesia.[25]

When the courts have found it necessary to determine the reliability of new or novel scientific evidence (or just "scientific evidence") they have focused on two separate reliability determinations – the reliability of the underlying theory or principle involved and the reliability of the technique which is used to apply the principle. Some courts have blended the two concepts together and simply require a determination of "reliability of the scientific evidence." Where the evidence involves new or novel science, the court will usually conduct a separate hearing on the reliability of the evidence before the expert testifies. With respect to the underlying theory or principle of hard science, the courts have traditionally looked at whether the theory is supported by a scientific basis in the laws of nature. Similarly, with respect to determining the reliability of the scientific technique, the court must be satisfied that the system used is scientifically valid. Courts have made these reliability determinations (or simply one determination of scientific validity) either by considering expert witness testimony[26] or, in some situations, where the court is satisfied that formal proof is not required, through the doctrine of judicial notice.[27] Once the court determines that the underlying principle and technique are reliable, it is further necessary for the court to insure that the technique was properly applied in the particular case.[28]

TESTS TO DETERMINE RELIABILITY OF "SCIENTIFIC EVIDENCE"

THE FRYE *RULE*

The determination by the courts of the reliability of scientific evidence during much of the last century was dominated by the *Frye* rule, wherein the trial court looks to members of the relevant scientific community to help the court determine whether the theory or technique upon which the evidence is based is generally accepted in the scientific community. The *Frye* rule, with its deference to scientific expert witnesses, often results in reduced discretion for the trial court judge,

---

23. *Brooks v. People*, 975 P.2d 1105, 1115 (Colo. 1999).
24. *State ex rel. Romley v. Fields*, 35 P.3d 82, 89 (Ariz. App. 2001).
25. *Logerquist v. McVey*, 1 P.3d 113, 118, 134 (Ariz. 2000).
26. *See e.g. State v. Mack*, 292 N.W.2d 764, 768-769 (Minn. 1980).
27. *See e.g. People v. Thomas*, 561 N.E.2d 57 (Ill. 1990).
28. *See e.g. People v. Castro*, 545 N.Y.S.2d 985, 999 (N.Y. App. Div. 1989).

who often resorts to simply "counting noses" of experts in making findings on reliability. Most courts have held that the *Frye* test applies only to scientific evidence that relies on novel theories or technology.[29] In addition to the novelty requirement of *Frye*, some courts have held that the general acceptance standard should be applied only to evidence "based on or derivative of hard science,"[30] leaving psychological evidence to be treated by application of traditional rules pertaining to experts. More recently, however, courts that follow the *Frye* rule have expanded its application to the behavioral or "soft" sciences.

Under the *Frye* rule, there are many issues that have troubled courts and scholars. For example, what is the relevant scientific community? How many individuals make up the scientific community? Some courts have held that one person cannot comprise a scientific community.[31] What evidence or testimony may be used to establish general acceptance? Several courts have held that a technician is not a scientist and therefore cannot speak for the scientific community.[32] Assuming the court has identified a scientific community, what percentage of the community is required to constitute general acceptance? Some courts have held that scientific evidence will be deemed generally accepted if it commands approval of a clear majority of the scientists in the field.[33]

Jurisdictions that have adhered to the *Frye* rule (even after *Daubert*) argue that the benefits of *Frye* outweigh its disadvantages.[34] The arguments begin with the proposition "that before the results of a Scientific process can be used against [a litigant, that person should be] entitled to a Scientific judgment on the reliability of [the] process."[35] This argument is particularly strong when made by a defendant in a criminal case as a matter of due process. It is further argued that the *Frye* rule puts the issue of reliability of scientific evidence in the hands of scientists, where it belongs. This assessment by the scientific community produces uniformity of decision, which is a valued policy in the law. It is also contended that the *Frye* rule protects both sides by

---

29. *See e.g. Brooks*, 975 P.2d at 1111.

30. *See e.g. id.*

31. *E.g. People v. Ferguson*, 526 N.E.2d 525, 531 (Ill. App. 2d Dist. 1988).

32. *E.g. People v. Kelly*, 17 Cal. 3d 24, 39-40 (1976).

33. *See e.g. U.S. v. Anderson*, 981 F.2d 1560 (10th Cir. 1992).

34. For a discussion of the arguments in favor of the *Frye* test, *see Reed v. State*, 391 A.2d 364, 369-372 (Md. 1978).

35. *Id.* at 369-370.

assuring that a minimal reserve of experts exist, who can critically examine the validity of scientific evidence. Also, it is argued that the conservative nature of *Frye* presents an important obstacle to unrestrained admission of evidence based upon new scientific principles.[36] Critics of *Frye*, however, argue that the rule's overly restrictive nature produces unjust results.[37] The limitations on one or a small number of scientists and the use of "cutting edge" technology often mean exclusion of potentially reliable evidence and a "justice delayed is justice denied" situation. Some critics have emphasized the problems with inherent bias of funded research and the difficulty in producing impartial and disinterested experts. Other courts have stressed that the general acceptance test is not in conformity with the spirit of the Federal Rules of Evidence, and the courts ask why uncertainty in the scientific community should deprive the fact finder of the opportunity to hear evidence on a particular subject.[38] These criticisms of the *Frye* rule led to a steady retreat by the courts from the general acceptance by scientists' standard to a more flexible test for determining reliability of scientific evidence, which is more compatible with the new evidence rules. Following the codification of the Federal Rules of Evidence in 1975, many courts construed the Rules' refusal to adopt a separate test for scientific evidence as a rejection of the *Frye* rule. These courts turned away from the novelty requirement of *Frye* and applied the same basic principles of evidence law to all expert witnesses. Basic reliability was determined by the qualifications of the expert and a description of the expertise of the witness.[39] As in all cases, the court determined the logical relevancy of the evidence.[40] The court further determined that the evidence of the qualified expert would assist the trier of fact, a helpfulness test beyond that required to meet the standard of logical relevance, and that the expert's opinion is properly based.[41] Lastly, the court considered whether the probative value of the expert testimony is substantially outweighed by any of the trial concerns of the doctrine of legal relevancy.[42] In this

36. For a discussion of the arguments against the *Frye* test, *see U.S. v. Downing*, 753 F.2d 1224, 1236-1237 (3d Cir. 1985).

37. *See generally Downing*, 753 F.2d 1224.

38. *Id.*

39. *See* Fed. R. Evid. 702.

40. *See* Fed. R. Evid. 401-402 (2004).

41. *See* Fed. R. Evid. 702-703.

42. *See* Fed. R. Evid. 403 (2004).

determination, in the exercise of discretion, the trial court judge may consider such factors as unfair prejudice, confusion of the issues, misleading the jury, and that the evidence is cumulative or takes too much time.[43]

THE DAUBERT *TEST*

The main alternative to the *Frye* rule is the *Daubert* test, which is applied in federal courts and has been adopted in many states. Under *Daubert*, the flexibility of the Federal Rules of Evidence is used by the trial court judge to assess the reliability of scientific knowledge and its connection to the issues of the case. *Daubert* held that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting scientific testimony in a federal trial.[44] The Court held that *Frye's* general acceptance test was superseded by the adoption of the Federal Rules of Evidence.[45] "Faced with a proffer of expert scientific testimony"[46] under Federal Rule of Evidence 702, the trial court, pursuant to Federal Rule of Evidence 104(a), must make a preliminary assessment of whether the testimony's underlying reasons or methodology are scientifically valid (a reliability determination) and "can [properly] be applied to the facts in issue"[47] (a relevancy determination). *Daubert* prescribed a recipe whereby the trial court judge considers various factors, which include whether the scientific theory or technique: (1) "can be (and has been) tested";[48] (2) is "subject[] to peer review and publication";[49] (3) "the known or potential rate of error";[50] (4) "the existence and maintenance of standards controlling . . . operation";[51] and (5) attracts widespread acceptance within the relevant scientific community.[52] The Court emphasized that the trial court's inquiry is to be flexible, with the focus solely on principle and methodology and not the conclusions

43. *Id.*
44. 509 U.S. at 587.
45. *Id.*
46. *Id.* at 592.
47. *Id.* at 592-593.
48. *Id.* at 593.
49. *Id.*
50. *Id.* at 594.
51. *Id.*
52. *Id.*

generated.[53] The Court also stated that the trial "judge . . . should also be mindful of other applicable rules of evidence."[54] On remand of *Daubert*, the U.S. Court of Appeals for the Ninth Circuit (*Daubert II*)[55] provided some guidance on how to determine whether the proposed expert testimony reflects scientific knowledge (the first of the two *Daubert* hurdles). The Ninth Circuit held that scientific knowledge may be established in two principal ways – showing that the expert will testify about research conducted independently of the litigation or showing that the research has been subjected to peer review.[56] The court also noted that failure in the first method would not be significant in the context of "scientific endeavors closely tied to law enforcement."[57] This analysis is illustrated with fingerprint evidence.[58] In *U.S. v. Mitchell*,[59] the expert's testimony that the latent fingerprint recovered from the crime scene matched the defendant's fingerprints was admissible under Rule 702 and *Daubert*, the court holding that fingerprint methodology is testable and the error rate is near zero.[60]

The list of factors in *Daubert* is not exclusive. The courts are permitted to identify other factors not discussed in *Daubert* to insure the scientific reliability of expert testimony. For example, the courts may have to consider whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. In *General Electric Co. v. Joiner*,[61] the U.S. Supreme Court noted that in some cases the trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[62] The

---

53. *Id.* at 594-595.

54. *Id.* at 595.

55. *See generally Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311 (9th Cir. 1995).

56. *Id.* at 1317-1318. The courts have discussed two kinds of peer review – "true" peer review, where scientific claims are evaluated by members of the relevant discipline through independent scientific investigation, and "editorial" peer review, which leads merely to publication in a published journal following referral of an article by a journal editor to two or more outside reviewers. For a discussion of peer review in the *Daubert* context, *see generally Valentine v. Pioneer Chlor Alkali Co.*, 921 F. Supp. 666 (D. Nev. 1996).

57. *Daubert*, 43 F.3d at 1317 n. 5.

58. *Id.*

59. 365 F.3d 215 (3d Cir. 2004).

60. *Id.* at 235-246.

61. 522 U.S. 136 (1997).

62. *Id.* at 146.

courts may consider whether the expert has adequately accounted for obvious alternative explanations.[63] Also, the court may determine whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."[64] Some courts read *Daubert* to require the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[65] A further inquiry is whether the field of expertise is known to reach reliable results for the type of opinion the expert will give.[66] In *Kumho*, the U.S. Supreme Court noted that *Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability as, for example, do theories grounded in . . . principles of astrology or necromancy."[67] One court has rejected testimony based upon "clinical ecology" as unfounded and unreliable.[68] Whatever *Daubert*-authorized factors are considered by the court, the trial judge must have considerable leeway in deciding in a particular case how to determine whether the expert testimony is reliable. "[N]ot only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."[69]

Several states have found DNA evidence to provide the opportunity to retreat from the general acceptance analysis of the *Frye* test to adopt the more flexible approach of *Daubert*.[70] Defense objections about laboratory practices and contamination of samples continue to be considered, and some courts consider these problems to go to the weight rather than admissibility of the evidence.[71] Other courts, which no longer follow the *Frye* rule, continue to rely upon the technique's general acceptance in the scientific community as authorized by *Daubert*.[72] Some courts have applied the more flexible *Daubert* test to scrap the per se rule of inadmissibility of all

63. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).
64. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).
65. *Kumho*, 526 U.S. at 152.
66. *Id.* at 151.
67. *Id.*
68. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1208-1209 (6th Cir. 1988).
69. *Heller v. Shaw Ind., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999).
70. *State v. Roman Nose*, 649 N.W.2d 815, 820 (Minn. 2002).
71. *See e.g. U.S. v. Martinez*, 3 F.3d 1191, 1197 (8th Cir. 1993).
72. *See e.g. U.S. v. Posado*, 57 F.3d 428, 433 (5th Cir. 1995).

unstipulated polygraph evidence.[73] These courts note scientific advances in polygraph techniques since it was rejected in *Frye*.[74] The courts state that when *Frye* was decided, the polygraph machine measured only changes in a subject's systolic blood pressure, while modern polygraph machines measure changes in blood pressure, pulse, respiration, and galvanic skin response.[75] Current estimates are that the polygraph technique gives an accurate reading of truth or falsity seventy to ninety percent of the time.[76] In *U.S. v. Galbreth*,[77] the court held that the results of a polygraph examination, where administered by a competent polygraph examiner is a valid scientific technique and, therefore, admissible under *Daubert*.[78] Other courts emphasize that the "bright-line" exclusionary rule with respect to polygraph results is inconsistent with the "flexible inquiry" assigned to the trial judge by *Daubert*.[79] These courts note that the trial judge must not only evaluate the evidence under Federal Rule of Evidence 702, but also consider its admission under Federal Rule of Evidence 403.[80] In *Cordoba*, the court of appeals reviewed the district court's conclusions on the problems with polygraph evidence – a lack of reliable error rate conclusions for "real life" polygraph testing; a lack of general acceptance in the scientific community for using polygraph testing to determine facts for presentation in court; and a lack of "reliable and accepted standards controlling polygraphy."[81] The court upheld the district court's conclusion that polygraph evidence does not meet the standard in Federal Rule of Evidence 702 set forth in *Daubert*.[82] Other courts have held that even if the technique used by the polygraph examiner satisfies Federal Rule of Evidence 702, as interpreted by *Daubert*, the results are not sufficiently appropriative to survive Federal Rule of Evidence 403's balancing test.[83]

It has been held that the rejection of expert testimony under

73. *Id.*
74. *Id.* at 434.
75. *Id.*
76. *Id.*
77. 908 F. Supp. 877 (D.N.M. 1995).
78. *Id.* at 893, 895.
79. *See e.g. U.S. v. Cordoba*, 194 F.3d 1053, 1056 (9th Cir. 1999).
80. *Id.*
81. *Id.* at 1058-1062.
82. *Id.* at 1062.
83. *See e.g. U.S. v. Gilliard*, 133 F.3d 809 (11th Cir. 1998).

Daubert is the exception rather than the rule.[84] In *Daubert*, the Court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof are traditional and appropriate means of attacking shaky but admissible evidence."[85] "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system . . . ."[86] As the Supreme Court observed in *Kumho*, the trial court has discretion to "avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods [are] taken for granted, and to require [a hearing] in less . . . usual or more complex cases where cause for questioning the expert's reliability arises."[87] Despite the flexible inquiry of *Daubert*, much evidence is excluded by the courts. For example, under *Daubert*, research on which an expert based the finding that fungicide damaged the plaintiff's crops was unreliable;[88] expert testimony that a defendant did not fit the sexual offender profile was unreliable and inadmissible, the court, citing *Daubert* and Rule 702, and noting that there is no test or group of tests which can determine if a person is likely to be a sexual offender.[89] Expert testimony on hedonic damages in a police shooting case was inadmissible, where testimony that sought to place a price tag on human life was based on the willingness-to-pay model, because it was not grounded solidly enough in the scientific method to clear the hurdle of Federal Rule of Evidence 702; the court further noted that such testimony can be misleading and thus is excludable under Federal Rule of Evidence 403.[90] Also, expert testimony that the decedent's exposure to halothane caused hepatitis and death was not sufficiently reliable and was, therefore, inadmissible;[91] hair comparison testimony is inadmissible under *Daubert* (there are few scientific studies of hair comparison and those available indicate the method is unreliable and there is a risk of the jury being overawed by

84. *U.S. v. 14.38 Acres of Land Situated in Leflore County, Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996).

85. 509 U.S. at 596.

86. *14.38 Acres of Land*, 80 F.3d at 1078.

87. 526 U.S. at 1176.

88. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558-560 (Tex. 1995).

89. *State v. Cavaliere*, 663 A.2d 96, 100 (N.H. 1995).

90. *Ayers v. Robinson*, 887 F. Supp. 1049, 1064 (N.D. Ill. 1995).

91. *Casey v. Ohio Med. Prods.*, 887 F. Supp. 1380, 1386 (N.D. Cal. 1995).

supposed scientific evidence);[92] a defendant's offer of expert testimony on eyewitness identification fails *Daubert* and Federal Rule of Evidence 702 because the defendant did not offer or describe any of the studies purportedly supporting the expert's opinion (without the studies, there was no way for the court to evaluate, as *Daubert* requires, the scientific validity of the reasoning and methodology underlying the expert's testimony), and the court saw real danger that the evidence would mislead and confuse the jury.[93] Further, the court set forth eight considerations bearing on admissibility of recovered memories and concluded that the phenomenon of recovered memory is not generally accepted in the psychological community;[94] an FBI agent, who is an expert in the investigative field known as forensic stylistics, may not, pursuant to *Daubert*, testify in a criminal trial as to his opinion, based upon review of writings known to have been authored by the defendant, that the defendant also wrote certain threatening letters;[95] the trial court did not abuse its discretion by holding that expert testimony of one of the leading psychologists who helped develop the use of the Horizontal Gaze Nystagmus (HGN) test as a field sobriety test is not sufficient to support admission of evidence of the defendant's performance on such a test at his trial for drunk driving, the court noting that as a psychologist, rather than a medical doctor, the state's witness was not an expert on physiological mechanisms that are affected by alcohol ingestion and that result in HGN behavior.[96]

Despite the flexible inquiry of *Daubert* and the usefulness of its non-exclusive list of factors, some states have rejected *Daubert* in favor of retaining the *Frye* test or other state standards.[97] Most states limit the application of *Frye* to new or novel scientific techniques, which leaves open the question whether state courts will adopt the *Kumho* rule, which makes the *Daubert* factors applicable for expert witness testimony (including experts who testify about technical and other specialized knowledge under Federal Rule of Evidence 702).

---

92. *Williamson v. Reynolds*, 904 F. Supp.1529, 1554-1555, 1558 (E.D. Okla. 1995).

93. *U.S. v. Rincon*, 28 F.3d 921, 923-924, 926 (9th Cir. 1994).

94. *State v. Hungerford*, 697 A.2d 916, 925, 928 (N.H. 1997). This case illustrates the possible reliance on the general acceptance test of *Frye* in a *Daubert* analysis. *Id.* at 928.

95. *U.S. v. Van Wyk*, 83 F. Supp. 2d 515, 523 (D.N.J. 2000).

96. *State v. Lasworth*, 42 P.3d 844, 847, 850 (N.M. App. 2001).

97. *See e.g. People v. Leahy*, 8 Cal. 4th 587, 591 (1994); *State v. Dean*, 523 N.W.2d 681, 692 (Neb. 1994); *State v. Copeland*, 922 P.2d 1304, 1310 (Wash. 1996).

One problem with extending *Daubert* to apply to "soft sciences," such as psychological evidence regarding the battered woman syndrome (BWS), the child sexual abuse accommodation syndrome (CSAAS), and other syndromes or behavioral profiles, is that many of these theories have only been developed recently.[98] As a result, experts may lack the data they need to determine the theory's merits.[99] This makes it difficult for a judge to decide whether or not a particular syndrome is falsifiable.[100] If experts in the field do not have the data to make such a determination, it is unlikely that a judge will. Moreover, many of these behavioral theories cannot meet the "falsifiable" requirement of the *Daubert* test no matter how much analysis they undergo.[101] Experts (and judges, for that matter) may have no means of determining the existence or non-existence of syndromes such as BWS or CSAAS. For example, a party asserting the existence of one of these syndromes could always argue that the non-existence of behavior associated with the syndrome means only that the alleged victim has repressed the psychotic behavior.[102] This is

98. *See generally* Sophia I. Gatowski et al., *The Globalization of Behavioral Science Evidence about Battered Women: A Theory of Production and Diffusion*, 15 Behavioral Sci. & L. 285, 290 (1997) [hereinafter Gatowski, *Globalization*] (discussing the relatively recent emergence of BWS as a viable scientific theory).

99. *See* James T. Richardson et al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 Judicature 10, 12-13 (1995) [hereinafter Richardson, *Problems*]; *cf.* James T. Richardson, *Dramatic Changes in American Expert Evidence Law*, 2 The Judicial Review 13, 23 (1996) [hereinafter Richardson, *Dramatic*] ("The courts have sometimes sought refuge in *Frye*-like principles in order to bring some order out of what appears to be a chaotic situation of there appearing to be a new syndrome developed every month."). Id.

100. Richardson, *Problems*, *supra* n. 99, at 12-13.

101. *See* Richardson, *Dramatic*, *supra* n. 99, at 25 (noting that *Daubert's* falsifiability requirement may call into question the *Diagnostic and Statistical Manual* used by the American Psychiatric Association). Shirley A. Dobbin & Sophia I. Gatowski, *The Social Production of Rape Trauma Syndrome as Science and as Evidence*, in *Science in Court* 125, 134 (Michael Freeman & Helen Reece, eds., Ashgate Publishing. 1999); Richardson, *Problems*, *supra* n. 99, at 13 (finding "no way to falsify" Freudian syndrome diagnoses "unless conditions are specified that determine which of the consequences of the trauma will occur under which circumstances."); Sophia I. Gatowski et al., *The Diffusion of Scientific Evidence: A Comparative Analysis of Admissibility Standards in Australia, Canada, England, and the United States, and Their Impact on Social and Behavioural Sciences*, 4 Expert Evid. 86, 90 (1996) [hereinafter Gatowski, *Diffusion*].

102. *See* Dobbin & Gatowski, *supra* n. 101, at 134 ("Many commentators suggest that widespread acceptance of questionable syndrome evidence that has limited scientific reliability and questionable probative value may result in a high number of

particularly troubling since *Daubert* identified the "key question" for the trial judge as "whether the theory or technique in question had been tested."[103] As such, syndromes can never satisfy *Daubert* because they are not testable. Courts that choose to rely on evidence stemming from a theory about this or that syndrome embrace what is in reality not a scientific theory at all.[104] The result is that the court adopts an inherently unreliable test, which can lead to a disproportionate number of "false positives."[105] In criminal trials, this could mean that an innocent party goes to jail as a sex offender on evidence that at best neither proves nor disproves anything and, at worse, affirmatively misleads a fact finder into issuing a verdict against the innocent defendant.[106]

THE KUMHO *DECISION*

Under *Kumho*, the federal trial court's gatekeeper obligation under Federal Rule of Evidence 702, as interpreted in *Daubert*, is to ensure that the expert's testimony is both relevant and reliable, and applies not just to testimony based upon "scientific knowledge," but also applies to testimony based upon "technical" and "other specialized" knowledge. When the specific *Daubert* factors are reasonable measures of reliability in a particular case, the trial court may consider them in making the reliability determination. In *U.S. v. Hankey*,[107] the court held that a police officer's specialized knowledge about a street gang's code of silence is admissible under Federal Rule of Evidence 702 to impeach a member's testimony (to show bias) and to exculpate the defendant. The court properly performed its

---

false positives . . ."); Richardson, *Problems*, *supra* n. 99, at 13. For an interesting discussion of the inability to falsify whether members of alternative religions ("cults") suffer from mental illness, *cf.* James T. Richardson, *Mental Health of Cult Consumers: Legal and Scientific Controversy*, in *Religion and Mental Health* 233 (John F. Schumaker, ed., Oxford University Press 1992).

103. Richardson, *Problems*, *supra* n. 99, at 12 (quoting *Daubert*, 509 U.S. 579).

104. *Id.* ("According to Popperian philosophy of science, a theory that is in principle falsifiable but has never been subjected to testing does not qualify as a scientific theory.").

105. *See* Richardson, *Dramatic*, *supra* n. 99, at 26 ("Other types of predictions of child sex abuse are also suspect in that they lead to an unacceptably high number of 'false positives'. . . .").

106. *See id.* (defining false positives as "identifying an individual as abused or an abuser when it is not true.") (quotation omitted).

107. 203 F.3d 1160, 1173 (9th Cir. 2000).

gatekeeper role as set out in *Daubert, Joiner,* and *Kumho.* In *U.S. v. Hines,*[108] the court held that absence of empirical studies demonstrating the reliability of handwriting comparison evidence (traditionally admissible special-skill evidence) results in exclusion of a portion of the expert's testimony (as to the conclusion that the defendant was the author of a stick-up note), applying *Kumho.*[109]

As noted above, state rules may differ. In *State v. Fukusaku,*[110] the court held that expert testimony based on technical knowledge (hair and fiber comparison) does not call for the same searching inquiry into reliability that is required for scientific evidence under Hawaii Rule of Evidence 702 and *Daubert,* noting that expert testimony on other types of knowledge is treated differently from "scientific knowledge."[111] In *State v. Vumback,*[112] the court did not adopt the *Kumho* rule and held that expert testimony on the complainant's lack of precision and delays in reporting abuse is not "scientific evidence" subject to the requirements of *Daubert.*[113] The courts have relaxed the application of *Daubert* under certain circumstances. In *McGrew v. State,*[114] the court stated that a short and relatively simple inquiry into the reliability of microscopic hair analysis is sufficient under *Daubert.*[115] The expert testified that his work involved no "scientific principle" but merely a microscopic comparison of hairs, which the expert stated was generally accepted.[116] The court noted that where the scientific principles involved are not "advanced and complex" then the foundation need not be advanced and complex either.[117] Other state courts have applied *Daubert* more restrictively. In *State v. Ayers,*[118] the court held that the *Daubert* analysis does not apply to evidence of likelihood ratio for a mixed DNA sample.[119] The court noted that the ratios, used to prove that someone was the source of some of the DNA, is not a novel

---

108. 55 F. Supp. 2d 62 (D. Mass. 1999).
109. *Id.* at 70-71.
110. 946 P.2d 32 (Haw. 1997).
111. *Id.* at 43.
112. 791 A.2d 569 (Conn. App. 2002).
113. *Id.* at 578-580.
114. 682 N.E.2d 1289 (Ind. 1997).
115. *Id.* at 1290-1291.
116. *Id.* at 1291.
117. *Id.* at 1292.
118. 68 P.3d 768 (Mont. 2003).
119. *Id.* at 776-777.

scientific technique, and therefore admission in a rape case of evidence of a likelihood ratio is not governed by *Daubert*.[120]

The *Daubert-Kumho* test did not eliminate the gatekeeper function of the trial judge so much as it altered it. Under the *Frye* test, the challenge the trial judge faces is whether the scientific evidence proffered is sufficiently established, or whether the evidence is too novel for the court to admit. *Daubert* and *Kumho* require a trial judge to depart from the *Frye* analysis and instead conduct a substantive analysis of *all* expert evidence. In the world of *Daubert* and *Kumho*, the judge may not conclude automatically that evidence is unreliable simply because the techniques used to gather it are new; instead, the court must determine the reliability of the evidence *ad hoc*, considering a variety of factors in addition to the esteem that the evidence-gathering method enjoys.[121] As such, the gatekeeper's challenge under *Daubert* and *Kumho* is essentially one about the meaning of "reliability." Doing so is not an easy task, as "reliability" is a difficult concept to define initially, and the definition may be subject to renegotiation. As a result, a judge applying the *Daubert* criteria needs to apply some additional sub-criteria as well. Doing so ensures that science does not become a reason inadvertently to tip the scales of an adversarial proceeding in favor of one of the parties. These criteria include: 1) the extent to which the method of gathering evidence itself prevents a *Daubert* reliability analysis; 2) the extent to which the legal-cultural context surrounding the evidence inhibits an objective determination of reliability; and 3) the extent to which the judge's own personality and experiences will affect his or her decision as to whether expert evidence is sufficiently reliable to be admitted.

EXPERT WITNESS TESTIMONY IN CHILDREN'S CASES

In recent years, the courts have seen a proliferation of psychological evidence in cases involving children and families. This evidence is obviously different from expert evidence derived from hard science, but it nevertheless presents the court with issues involving scientific analysis. Often, this soft, social and behavioral science evidence is not far beyond the common experience of jurors (e.g., eyewitness identification testimony and fantasies of children), and often reflects (directly or indirectly) on witness credibility.

120. *Id.*

121. *See* Richardson, *Dramatic*, *supra* n. 99, at 16.

Psychological evidence also presents the court with the familiar question of whether the impact of anything "scientific" is prejudicial. Courts continue to be concerned about the floodgates problem with the ongoing development of new behavioral profiles and syndromes and are concerned about the "evidentiary imperative," which says that now that this behavioral evidence exists, the court, therefore, should admit it. This article identifies three categories of behavioral science evidence which are widely considered by courts in child cases and considers how adaptable this evidence is to the tests of *Frye*, *Daubert*, and *Kumho*.

"TRAITS EVIDENCE" – VICTIMS

Traits evidence with respect to victims consists of a generalized description of the psychological and emotional characteristics of child victims of maltreatment (abuse or neglect) and the expert's opinion that the victim in question exhibits such traits. The expert may attempt to define credibility and describe profiles to measure credibility in abused children. The testimony of the expert seeks to compare patterns in the victim's behavior in the case at hand with clinically observed patterns common to other similarly situated victims (e.g., child sex abuse victims). Similarly, traits evidence, which may be described as a profile or syndrome, is limited to offering an explanation of certain behaviors by the victim (as opposed to being a test for whether the alleged perpetrator did it). For example, expert testimony on BWS is admissible to explain the victim's prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, or delays in reporting or recanting allegations.[122] Expert testimony on BWS is admissible to explain why an alleged first-time victim of domestic violence recants her testimony.[123] Rape trauma syndrome (RTS) is admissible under the *Frye* test in a child sex abuse trial to assist the jury in understanding behavioral patterns of child sex abuse victims.[124]

As one would expect, the courts vary in their degree of acceptance of different types of traits evidence, whether or not labeled as a syndrome or profile. An important problem noted by some courts is that the syndrome or profile is over-inclusive (i.e., the traits may

---

122. *See e.g. People v. Christel*, 537 N.W.2d 194, 202, 205 (Mich. 1995).

123. *See e.g. People v. Salinas*, 106 Cal. App. 4th 993, 998-1000 (5th Dist. 2003).

124. *See e.g. State v. Bachman*, 446 N.W.2d 271, 277 (S.D. 1989).

arise from other experiences). In *State v. Ballard*,[125] the court held that expert testimony on post-traumatic stress syndrome (PTSS) is inadmissible in a child sex abuse case.[126] The court noted that expert testimony invades the province of the jury to decide credibility of witnesses and the symptoms listed may be exhibited by children who are distressed for other reasons.[127] In *Lantrip v. Kentucky*,[128] the defendant was convicted of two counts of rape of his adopted daughter.[129] At the trial, a witness with a M.S.W. degree and who had evaluated the victim, described the victim's behavior following the incident as fulfilling the guidelines of the CSAAS.[130] The witness listed five elements of the syndrome: (1) "secrecy" about the sexual abuse, often insured by threats of negative consequences of disclosure; (2) "helplessness" to resist or complain; (3) "entrapment and accommodation," where the child sees no way to escape ongoing abuse and learns to adapt; (4) "delay in disclosure," which is often conflicted and unconvincing; and (5) "retraction," in an attempt to restore order to the family structure when disclosure threatens to destroy it.[131] The court reversed the conviction, finding that the syndrome had not attained scientific acceptance among clinical psychologists or psychiatrists.[132] The court further noted that even if the syndrome should receive such acceptance, it doubted its use in Kentucky, because the question of whether a child who had not been abused could also develop the same symptoms would continue to discredit the use of the syndrome.[133]

The courts are also concerned about the risk of bleed-over from traits evidence to the often impermissible ultimate opinion of the expert witness. In *State v. Cressey*,[134] the court held that expert testimony that a child's symptoms were consistent with those of a sexually abused child was not sufficiently reliable to be admitted as evidence

---

125. 855 S.W.2d 557 (Tenn. 1993).
126. *Id.* at 562-563.
127. *Id.* at 562.
128. 713 S.W.2d 816 (Ky. 1986).
129. *Id.* at 816.
130. *Id.* at 817.
131. *Id.*
132. *Id.*
133. *Id.*
134. 628 A.2d 696 (N.H. 1993).

that she was sexually abused.[135] The court would not distinguish between testimony by the expert that the children's symptoms were consistent with those of sexually abused children and testimony that, in the expert's opinion, the children were sexually abused.[136] Both types of testimony would lead a jury to think the expert believed that the children were sexually abused.[137] Some courts have taken a more realistic view and have recognized that the bleed-over from traits evidence to credibility is inevitable. In *People v. Koon*,[138] a defendant was convicted of two counts of first-degree sexual assault on his twelve-year-old stepdaughter.[139] At trial, a police psychologist qualified as an expert in the field of victim psychology, described "certain . . . behavioral patterns which are unique to child incest victims, and [their] families."[140] A social worker testified, based upon her observations of the victim's behavior, that the victim's "behavioral characteristics were the same as . . . described by the police psychologist."[141] The court recognized the distinction between rape trauma syndrome and "child sexual abuse syndrome," and recognized that the child sexual abuse syndrome may be introduced, despite the fact that it may incidentally create the inference that the victim is or is not telling the truth about the specific incident.[142] The court noted that expert "testimony [inevitably] bolster[s] or attack[s] the credibility of another witness."[143] In *Frenzel v. State*,[144] the expert witness related the victim's behavior to each of the five characteristics of CSAAS, describing the victim's behavior as consistent with CSAAS.[145] The court held that the expert's testimony was proper and did not vouch directly for the credibility of the child; however, the court acknowledged the "incidental effect of supporting the victim's credibility."[146] Similarly, in *Ward v. State*,[147] the court held that a

135. *Id.* at 699.
136. *Id.* at 699-700.
137. *Id.* at 700.
138. 724 P.2d 1367 (Colo. App. Div. II 1986).
139. *Id.* at 1369.
140. *Id.*
141. *Id.*
142. *Id.* at 1370.
143. *Id.*
144. 849 P.2d 741 (Wyo. 1993).
145. *Id.* at 745-746.
146. *Id.* at 746.

psychologist's opinion that a child sex abuse complainant displayed symptoms consistent with those of sexually abused children did not impermissibly bolster the credibility of the child.[148] The court noted that vouching was not direct but a necessary incident of the expert's testimony.[149]

Traits evidence pertaining to victims, not necessarily stated in profile or syndrome terms, is widely accepted by the courts, primarily because the evidence helps jurors evaluate and comprehend matters not within their common experience. The courts have emphasized the limited purposes for traits evidence. Several courts have discussed the helpfulness of CSAAS evidence to prove why the child delayed in reporting and recantation, secrecy and delayed disclosure, and to rehabilitate the child rather than prove substantive guilt of the alleged perpetrator.[150] CSAAS evidence is usually offered in rebuttal once evidence is offered which is inconsistent with child abuse. The limited purpose of the evidence was discussed in *State v. Middleton*,[151] where the court held that traits evidence is not admissible to show that the offense actually occurred, but is only admissible to explain any seemingly inconsistent response to the trauma exhibited by the victim.[152] Similarly, in *People v. Wells*,[153] the court emphasized that testimony regarding CSAAS is admissible only to disabuse jurors of myths concerning expected behavior of victims of sexual abuse, not to "prove that . . . molestation actually occurred."[154]

Some courts reject traits evidence for its improper bolstering of the credibility of the alleged victim and thereby invading the province of the jury.[155] Other courts hold that traits evidence does not pass the standard for scientific evidence.[156] In *Cressey*, the court held that a

147. 519 So.2d 1082 (Fla. 1st Dist. App. 1988).

148. *Id.* at 1084-1085.

149. *Id.* at 1084.

150. *See e.g. Wheat v. State*, 527 A.2d 269, 274 (Del. 1987); *State v. Payton*, 481 N.W.2d 325 (Iowa 1992); *State v. Foret*, 628 So.2d 1116, 1130 (La. 1993); *State v. J.Q*, 599 A.2d 172, 174 (N.J. Super. App. Div. 1991).

151. 657 P.2d 1215 (Or. 1983).

152. *Id.* at 1221.

153. 118 Cal. App. 4th 179 (Cal. App. 1st Dist. 2004).

154. *Id.*at 188.

155. *See Commw. v. Garcia*, 588 A.2d 951, 956 (Pa. Super. 1991), *overruled*, *Commw. v. Johnson*, 690 A.2d 274 (Pa. Super. 1997).

156. *See Cressey*, 628 A.2d at 700.

psychologist's testimony, based on art therapy and other techniques, that the complaining witness in a child sex abuse case had symptoms consistent with those of abuse victims was not sufficiently reliable.[157] In *People v. Leon*,[158] the court held that CSAAS is not generally accepted in the scientific community pursuant to the *Kelly-Frye* rule.[159]

"TRAITS EVIDENCE" – ALLEGED PERPETRATORS

Traits evidence pertaining to alleged perpetrators consists of a generalized description of psychological and emotional characteristics of alleged perpetrators of, for example, sexual abuse, and the expert's opinion that the alleged perpetrator exhibits such traits. Unlike victims' traits evidence, evidence of traits of alleged perpetrators is generally excluded by the courts. Evidence of traits that alleged perpetrators exhibit may violate due process. In *State v. Clements*,[160] the expert witness testified that sexual abusers of children generally fall into two categories: "fixated" offenders, whose sexual attraction to other children becomes fixed during adolescence and who are not amenable to treatment, and "regressed" offenders, whose desire for children results suddenly from a stressful event and whose treatment prognosis is good.[161] The court held that the expert's testimony on the child sex abuser profile, together with the prosecutor's efforts to link the accused to a typical "fixated" pedophile, created an improper inference of guilt and denied the defendant a fair trial.[162] Evidence of traits of alleged perpetrators may also raise an improper inference of character. In civil proceedings, the law of evidence prohibits substantive character proof unless character is an issue in the case.[163] In criminal cases, substantive character is not admissible to prove conduct, unless the accused opens the door with his good character, in the form of reputation or opinion, or offers evidence of the victim's character.[164] In *Sanders v. State*,[165] the court held that the expert's

157. *Id.* at 699.
158. 263 Cal. Rptr. 77 (Cal. App. 2d Dist. 1989), *review denied and ordered not published.*
159. *Id.* at 84.
160. 770 P.2d 447 (Kan. 1989).
161. *Id.* at 454.
162. *Id.*
163. Fed. R. Evid. 404-405 (2004).
164. *Id.*; Fed R. Evid. 608 (2004).
165. 303 S.E.2d 13 (Ga. 1983).

testimony relating to the battering parent syndrome (BPS) improperly implicated the defendant's character, even though the expert never expressly formed a conclusion that the defendant fit the profile of a battering parent.[166] Similarly, in *U.S. v. Quigley*,[167] the court held that the government should not have been allowed to introduce extensive expert testimony about characteristics of the typical drug courier (drug courier profile) and how the defendant matched those characteristics as substantive evidence to establish that the defendant intended to distribute a kilogram of cocaine found in the car he was driving.[168] In *Brunson v. State*,[169] the court excluded expert witness opinion testimony that a spousal murder defendant fit the profile of men who kill their wives because the evidence invaded the province of the jury and was more prejudicial than probative.[170] The expert witness identified the defendant as one who met eight of ten risk factors for a batterer who will turn murderer.[171] The witness explained that the factors were taken from an article by a police officer that surveyed 70,000 cases.[172] Surprisingly, the court did not examine the application of the law of character evidence or *Daubert* to this case.

One area where evidence of traits of alleged perpetrators is admitted by the courts is as rebuttal evidence. In *U.S. v. Beltran-Rios*,[173] the court held that the prosecution could introduce expert testimony that the defendant shared a number of physical characteristics with the "typical drug courier," to rebut the defendant's claim that he was a "poor simple farmer."[174] The defendant opened the door by suggesting that he was not part of a drug "smuggling operation because he lack[ed] the accoutrements of wealth associated with such profitable activity."[175]

166. *Id.* at 18.
167. 890 F.2d 1019 (8th Cir. 1989).
168. *Id.* at 1024.
169. 79 S.W.3d 304 (Ark. 2002).
170. *Id.* at 311.
171. *Id.*
172. *Id.* at 308.
173. 878 F.2d 1208 (9th Cir. 1989).
174. *Id.* at 1210, 1213.
175. *Id.* at 1212.

"GENERAL TRUTH"

The term "general truth" is used to describe testimony, which is couched in general terms, that children are unlikely to fabricate claims of sexual abuse. This evidence addresses the child's ability to separate truth from fantasy and may include the expert's opinion that the child in question fits into the category. Some courts reject general truth evidence because the inference to be drawn on the likelihood of fabrication or fantasy is that the child is telling the truth, which is generally regarded as an improper invasion of the province of the jury.[176] Also, some courts consider general truth to be improper bolstering of the credibility of a witness who has not been attacked on cross-examination or otherwise.[177] In *State v. Myers*,[178] the court held that it was an abuse of discretion and prejudicial to the defendant for the court to admit an opinion on matters that directly or indirectly renders an opinion on the credibility of a witness.[179] In *U.S. v. Binder*,[180] the court held that the experts' opinion that child victims can "distinguish reality from fantasy and truth from falsehood . . . bolster[ed] the children's testimony and . . . usurp[ed] the jury's . . . function."[181] In *Commonwealth v. Rather*,[182] the court held that the expert's reply to a hypothetical question about child abuse victims "impliedly" vouched for their credibility.[183] The court recognized that the line separating proper expert testimony on patterns of disclosure and improper vouching for a child witness is a narrow one.[184] The court in *Rather* offered suggestions to address this issue: (1) a thorough voir dire of the expert out of the jury's presence; (2) warning the expert witness that opinions as to credibility of the child witness testimony or as to the general veracity of child abuse victims were not allowed; and (3) careful jury instructions outlining the proper use of expert testimony.[185] Courts have also found that general truth evidence deals with matters not beyond the ken of ordinary lay jurors. In *State v.*

---

176. *Roberson v. State*, 447 S.E.2d 640 (Ga. App. 1994).
177. *See id.*
178. 382 N.W.2d 91 (Iowa 1986).
179. *Id.* at 97-98.
180. 769 F.2d 595 (9th Cir. 1985).
181. *Id.* at 602.
182. 638 N.E.2d 915 (Mass. App. 1994).
183. *Id.* at 919-920.
184. *Id.* at 919.
185. *Id.* at 920-921.

Mazerolle,[186] the court held that the expert may not testify on the issue of fabrication by children, ages five, seven, and nine.[187] The expert would have stated that children's allegations could be childhood fantasies because they involve factors not usually found in child abuse cases.[188] The court stated that the jury was capable of drawing a conclusion about the believability of the children's allegations.[189] The courts also exclude general truth because it is not helpful (i.e., it will not assist the fact finder).[190]

Despite these potential problems with general truth evidence, many courts find the evidence to be helpful and admissible. In *Ex parte Hill*,[191] the court held that expert testimony by social workers that children, in general, do not fabricate allegations of sexual abuse and that recantation of such allegations is not unusual is admissible at a rape and sexual abuse trial.[192] The court stated that the testimony indirectly bolstered the credibility of the complaining witness, but was nevertheless helpful to the jury, and that confusion, "shame[,] and guilt associated with sexual abuse of children are beyond the ken of the average juror."[193] In *People v. Fasy*,[194] the court held that expert testimony on post-traumatic stress disorder assisted the jury in understanding the child's behavior after the incident and explained her delayed reporting.[195] In *Hall v. State*,[196] the court held that a clinical social worker's testimony that the child victim's behavior was "strongly associated with his being a victim of child sexual abuse"[197] did not amount to an impermissible expression of opinion on the truthfulness of another's testimony (even though the testimony came in response to the prosecutor asking if the behavior was "basically caused by"[198] abuse).[199]

---

186. 614 A.2d 68 (Me. 1992).
187. *Id.* at 70-71.
188. *Id.*
189. *Id.*
190. *See id.*
191. 553 So.2d 1138 (Ala. 1989).
192. *Id.* at 1138-1139.
193. *Id.* at 1139.
194. 829 P.2d 1314 (Colo. 1992).
195. *Id.* at 1317.
196. 670 A.2d 962 (Md. Spec. App. 1996).
197. *Id.* at 964, 967.
198. *Id.* at 964.

"PARTICULAR TRUTH"

"Particular truth" expert witnesses' opinion consists of evidence that a child witness was telling the truth during in court or out-of-court testimony. The evidence may include a credibility assessment of the child, with helpfulness under Federal Rule of Evidence 702, enhanced by consideration of various diagnostic criteria. In *People v. Aldrich*,[200] the court considered various "validation" criteria as professional standards for assessing the credibility of children alleging sexual abuse (e.g., mental age versus chronological age, intelligence, level of suggestibility of the child, motivation for disclosure, consistency in details of the child's story to others, physical evidence, background documentation, and history of confabulation on sexual matters).[201] Some courts hold that Federal Rule of Evidence 702 is not intended to permit experts to give a particularized opinion on the credibility of a child witness and, thereby, tell the jury what result to reach.[202] Other courts make a distinction between an expert's opinion that a child has the ability to tell the truth, rather than an opinion that the child is telling the truth.[203] One court has held that an expert witness may properly give an opinion that a child abuse victim was "genuine" in her expressed emotional state following a sexual assault.[204] The court noted that the expert's testimony was neither substantive character proof nor was it expert opinion on the credibility of the child.[205] The victim had merely been responding to the expert's questions regarding her emotional state and not to any questions that actually touched upon whether the rape occurred or who might have committed it.[206]

As a general rule, particular truth evidence is rejected by the courts. Some courts consider particularized opinion to invade the province of the jury, who alone determine witness credibility.[207] In *People v. Matlock*,[208] the court held that an expert's opinion as to the

199. *Id.* at 965, 967.

200. 849 P.2d 821 (Colo. App. 1992).

201. *Id.* at 827-828.

202. *See e.g. Commw. v. Carter*, 403 N.E.2d 1191, 1193 (Mass. App. 1980).

203. *E.g. Head v. State*, 519 N.E.2d 151, 153 (Ind. 1988).

204. *State v. Wise*, 390 S.E.2d 142, 145 (N.C. 1990).

205. *Id.* at 146.

206. *Id.*

207. *See State v. Kim*, 645 P.2d 1330, 1334 (Haw. 1982), *overruled*, *State v. Batangan*, 799 P.2d 48 (Haw. 1990).

208. 395 N.W.2d 274 (Mich. App. 1986).

"truthfulness of her patients' and children's stories of sexual abuse placed an impermissible stamp of scientific legitimacy to the truth" of the twelve-year-old victim's story.[209] In *State v. Jackson*,[210] the court held that testimony by two child abuse investigators that a child was telling the truth was reversible error because the witnesses attempted to serve as "human lie detectors for the child."[211] In *Head*, the court noted that traits evidence and general truth evidence are admissible, but the court disallowed an expert's opinion on the truth of the child's testimony because the opinion invaded the province of the jury.[212] In *Zabel v. State*,[213] the court held that an expert's testimony regarding the credibility of a child abuse victim improperly invaded the province of the jury and was prejudicial (where there was no physical evidence of abuse).[214] In *State v. Boston*,[215] the court held that expert opinion that a child had not fantasized her abuse and had not been programmed "was not only improper – it was egregious, prejudicial and constitutes reversible error," and infringed upon the roll of the fact finder.[216] However, in *State v. Gersin*,[217] the court held that a defendant's expert witness testimony concerning proper protocol for interviewing alleged victims of child abuse is admissible under the Ohio counterpart to Federal Rule of Evidence 702.[218] The court noted that such testimony can assist the jury by making it aware of accepted practices in interviewing child witnesses.[219] The court stated "that the testimony concerned, not [the] veracity [of the witness, as in *Boston*], but rather the method and technique used by the prosecution's witnesses to elicit the child's story."[220]

Particular truth evidence is also excluded on the grounds that it improperly bolsters the complainant's credibility before the witness has

---

209. *Id.* at 278.
210. 721 P.2d 232 (Kan. 1986).
211. *Id.* at 238.
212. *Head*, N.E.2d at 152-153.
213. 765 P.2d 357 (Wyo. 1988).
214. *Id.* at 362-363.
215. 545 N.E.2d 1220 (Ohio 1989), *modified*, *State v. Dever*, 596 N.E.2d 436 (Ohio 1992).
216. *Id.* at 1240.
217. 668 N.E.2d 486 (Ohio 1996).
218. *Id.* at 487.
219. *Id.* at 487-488.
220. *Id.* at 486, 489.

first been discredited, which is required by Federal Rule of Evidence 608(a) and its state counterparts. In *State v. Kim,*[221] the court held that the expert's testimony was interpreted as vouching for the victim's credibility as a witness.[222] In *State v. Rimmasch,*[223] the court held that the expert's opinion violated Rule 608(a).[224] The court warned against "modern oath-helpers who would largely usurp the fact-finding function of [a] judge or jury."[225] In *Commonwealth v. Smith,*[226] the court held that the expert's testimony, which opined that a child sex abuse victim was telling the truth, amounted to evidence of the child's reputation for veracity before it had been attacked, which is impermissible under the rules of evidence.[227] Other courts have held that expert opinion on the credibility of the complainant is not beyond the understanding of a lay jury and, therefore, expert testimony is not necessary. Some courts have expressed rejection of the expert's particularized opinion on the credibility of a child witness or declarant as not being of assistance to the jury under the counterpart of Federal Rule of Evidence 702. It has also been held that the expert need not literally state an opinion about another witness for the evidence to be impermissible.[228] In *State v. Haslam,*[229] the court held that expert testimony with the same "substantive import" was improper, and thus in a child abuse prosecution the child's counselor's testimony "that she counseled [the child] for sexual-abuse recovery" was impermissible as improper vouching of the child's credibility (improperly vouching for OR improper vouching of).[230]

Under certain circumstances, however, particular truth evidence may be admissible. A few courts hold that where the expert's opinion on truthfulness is outside the common knowledge of the jury that assistance is necessary. In *Kim* [Haw.], the court held that child sex abuse cases are different and deserve special attention because jurors may not have special knowledge about the truthfulness of child

221. 350 S.E.2d 347 (N.C. 1986).
222. *Id.* at 351.
223. 775 P.2d 388 (Utah 1989).
224. *Id.* at 392-393.
225. *Id.* at 392.
226. 567 A.2d 1080 (Pa. Super. 1989).
227. *Id.* at 1082.
228. *See State v. Haslam,* 663 A.2d 902 (R.I. 1995).
229. *Id.* at 905-906.
230. *Id.* at 905.

victims.[231] In *State v. Geyman*,[232] the court held that there is no infringement on the jury's role as long as jurors remain free to accept or reject the expert's testimony.[233] Also, the expert's particularized opinion on the credibility of the child witness may be admissible as rebuttal evidence. This may occur, for example, where a defendant discredits the child's credibility by showing that the mother or other caregiver did not believe the child for several months. The defendant in this situation may waive responsive expert opinion on the "particular truth" of the victim. In *Adesiji v. State*,[234] the court held that the defendant showed that the mother ("the ultimate expert on the [victim's] credibility"[235]) disbelieved the victim's complaints, and, therefore, waived objection to the opinion on particular truth.[236]

THE GATEKEEPER'S CHALLENGE

Several recent studies reveal that often what judges believe is a well established and reliable hypothesis, in fact, began as a political and/or legal movement. Some scholars have suggested that, outside the United States, common law jurisdictions take cues from one another as to what evidence is sufficiently reliable for admission into court.[237] For most common law systems, then, science does not determine the admissibility of evidence so much as the work of legal scholars and judges, many of whom do not have an adequate understanding of what constitutes a reliable scientific theory.[238] If the first court to find a

---

231. 645 P.2d at 1338.

232. 729 P.2d 475 (Mont. 1986).

233. *Id.* at 480.

234. 384 N.W.2d 908 (Minn. App. 1986).

235. *Id.* at 911-912.

236. *Id.*

237. *See* Gatowski, *Globalization*, *supra* n. 98, at 291 (finding that American case law and legal commentary influences whether other common law jurisdictions will admit a particular type of scientific evidence); Gatowski, *Diffusion*, *supra* n. 101, at 91 ("Our research thus far indicates that the diffusion process, at least for novel social and behavioural sciences . . . typically seems to involve the development of such ideas within the American legal context, with the ideas then being transmitted to other countries via legal publications and research by attorneys seeking ways to handle contemporary [issues].").

238. For a discussion of judges' general confusion as to what constitutes a good scientific theory, *see generally* Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & Hum. Behav. 433 (2001) [hereinafter Gatowski, *Asking*].

particular theory admissible correctly employs scientific criteria in doing so, the fact that other jurisdictions borrow that court's conclusion raises no problems. Such is not the case, however, when it comes to behavioral sciences, and particularly the various syndromes, such as rape trauma syndrome (RTS). Some of the same researchers argue that RTS began not as a scientific development but as a political movement associated with contemporary feminism.[239] Only when the American Psychiatric Association incorporated RTS in its *Diagnostic and Statistical Manual of Mental Disorders* did the syndrome "solidify" its position as a scientific theory rather than a political movement.[240] The scholars describe this process as the development of an "evidence industry," which in turn exports its views into other legal cultures via case law and academic commentary.[241]

Evidence of syndromes thus presents judges with the difficult, if not impossible, task of distinguishing science from politics. Aside from the obvious legal problems it raises, the confusion of social science with sociopolitical movements can pose problems for those who actually suffer from the syndrome in question. One scholar concludes, "RTS has turned the reaction itself – the 'symptoms' – into behaviour at best pitied and at worst condemned."[242] She explains that relying on a syndrome to indicate whether or not a woman has been raped victimizes the woman, turning her into a helpless, dependent object, which cannot stand alone without support.[243] Having removed "women's rape experience from its social and political context,"[244] a theory that originated in the feminist movement now seems to counteract many of that movement's goals. Although RTS differs by definition from syndromes associated with child abuse, judges may want to think over the policy concerns RTS raises before allowing evidence of CSAAS or similar syndromes.

The final challenge trial judges must face when deciding whether to admit evidence from the soft sciences comes from themselves. Even assuming that trial judges remain perfectly objective, few may know

239. *See* Dobbin & Gatowski, *supra* n. 101, at 127.

240. *Id.* at 130 (noting that while the APA did not specifically list RTS in its manual in 1980, it did list post-traumatic stress disorder (PTSD), of which "RTS has been explicitly recognized as a classic form").

241. *See* Gatowski, *Globalization, supra* n. 98, at 291.

242. Dobbin & Gatowski, *supra* n. 101, at 138.

243. *Id.*

244. *Id.*

enough about scientific processes in order to apply the *Daubert* criteria correctly. In *Daubert*, Justice Blackmun assumed that trial judges would have the scientific knowledge to apply the criteria.[245] Chief Justice Rehnquist questioned this assumption in his dissent.[246] History may ultimately vindicate the Chief Justice. Most people, including judges, would find it very difficult "to address directly the idea of how theories–especially 'pet theories' in which they believe – should be tested in order to pass muster in . . . terms of falsifiability."[247] Empirical evidence supports this conclusion; one survey found that of the state trial judges surveyed, the surveyors could "infer a true understanding of the scientific meaning of falsifiability in [only] six percent . . . of the judges' responses."[248] The surveyors could only determine that four percent of the judges surveyed had a clear understanding of "the scientific meaning of error rate."[249] The creators of the survey concluded "judges have difficulty operationalizing the *Daubert* criteria and applying them, especially with respect to falsifiability and error rate."[250] This conclusion seems even grimmer considering that oftentimes judges have personal biases that would lead them to accept one scientific theory over another on non-scientific grounds.[251]

None of the scholarship suggests that the courts should abandon *Daubert* and its companion cases.[252] The message was instead one of guarded acceptance. After all, in at least one survey, an overwhelming majority of state trial judges found the *Daubert* criteria at least

---

245. Richardson, *Dramatic, supra* n. 99, at 16 (quoting *Daubert*, 509 U.S. 579).

246. *Id.* at 17.

247. *Id.* at 19; *see also* Richardson, *Problems*, n. 99, at 11 (finding that "judges' level of understanding of scientific principles and methodology may ill prepare them to evaluate science, including social science, as now required by Daubert . . ."); Gatowski, *Diffusion, supra* n. 101, at 90 ("Some judges may also not be prepared to do a thorough analysis of the underlying methodology of the proffered scientific claims . . .").

248. Gatowski, *Asking, supra* n. 238, at 444.

249. *Id.* at 445, 447.

250. *Id.* at 452.

251. *See* Gatowski, *Globalization, supra* n. 98, at 296 ("We anticipate that the more favorable the attitude of the judge towards science and its function in law, the more likely it is that the judge will be open to its possible admissibility . . . ."); Gatowski, *Diffusion, supra* n. 101, at 90 (acknowledging that judges' "personal feelings and biases" can affect whether or not he or she will admit scientific evidence).

252. *See* Richardson, *Dramatic, supra* n. 99, at 19 (finding it "imperative" that judges receive better education as to the scientific meanings of the *Daubert* criteria).

somewhat helpful.[253] The evidence encourages judges to remember, however, that the behavioral science they review is being introduced into a legal proceeding. The principal challenge of the gatekeeper is to remember that the purpose of gatekeeping is to protect the parties before the court. A judge should not discount the context in order to assume a role as the arbitrator of scientific truths that he or she may or may not be able to identify correctly.[254]

CONCLUSION

In states that have adopted *Daubert*, the trial court's role as gatekeeper is a significant change from the days of the *Frye* test. Nevertheless, among its factors, *Daubert* included general acceptance in the scientific community, which is a familiar analysis to judges in *Frye* jurisdictions. In the post-*Daubert* world, state trial court judges continue to struggle with the meaning of scientific knowledge and, therefore, scientific evidence. Indeed, some courts continue to limit the application of *Daubert* to new or novel scientific techniques, leaving the trial court free to exercise discretion with respect to the determination of the reliability of other subjects of expert testimony. Most courts, however, interpret *Daubert* to not require a novelty determination, but rather apply the *Daubert* factors to any scientific subject described by the expert. Most states continue to not apply *Frye* or *Daubert* to experts whose subjects comprise the specialized or other technical knowledge prongs of Rule 702. It remains unclear as to whether the *Kumho* decision will be adopted in most states, thereby requiring a *Daubert*-type analysis every time an expert testifies in a state court (which has adopted *Daubert*). *Kumho* represents a further affirmation by the U.S. Supreme Court as to the trial court's role as gatekeeper when expert testimony is presented. *Kumho* has significant implications for juvenile and family courts. As we have seen, with respect to "traits evidence," the courts tend to consider the evidence of psychological profiles and syndromes as new or novel (in a *Frye* jurisdiction) or scientific knowledge requiring a *Daubert* analysis. However, much of the evidence in children's cases can be described as "general truth" or "particular truth," which many courts have found to resemble the determination of credibility, which is within the

253. Gatowski, *Asking*, *supra* n. 238, at 443.

254. *See* Dobbin & Gatowski, *supra* n. 101, at 138 (urging that psychological syndromes should not be divorced from their political contexts).

understanding of lay jurors. To the extent that the state court considers general truth or particular truth or, for that matter, traits evidence, to be technical or other specialized knowledge, no reliability test at all would be required, unless the court has adopted the *Kumho* decision (which would trigger application of a *Daubert* analysis). Some states have expressly rejected *Kumho*, which therefore limits the court's gatekeeper role with respect to expert witnesses. Other states have adopted *Kumho*, which brings these states in line with the federal approach of the trial judge acting as a gatekeeper with all experts. Other states may enact statutes consistent with the 2000 Amendment to Federal Rule of Evidence 702,[255] which incorporates *Daubert* and *Kumho*. For states, which have not adopted *Kumho*, the question will be whether to apply a reliability test, similar to that created in *Daubert*, to non-scientific expert testimony. In states that have adopted *Kumho*, the trial court judge, as gatekeeper, has the discretion to apply *Daubert* factors or any other factors that are appropriate for the particular expert. The standard of appellate review under *Joiner* and *Kumho* is abuse of discretion, which means that the trial judge's determination of reliability must withstand a determination of reasonableness by the appellate court. This means that to find abuse of discretion, the reviewing court must determine that the decision by the trial judge was against the logic and effect of the circumstances before the court, devoid of reason and essentially that no reasonable judge could have come to the conclusion of the trial court. The appellate court may also find abuse of discretion where the trial court misconstrues the law. This deference to juvenile and family courts, often exercising their parens patriae role, on determinations of the reliability of subjects of expert testimony, suggests that doubts are to be resolved in favor of the gatekeeper pursuant to *Frye*, *Daubert*, and *Kumho*.

---

255. The 2000 Amendment to Federal Rule of Evidence 702 was enacted in response to *Daubert* and *Kumho*. The Amendment provides that expert testimony is admissible "[i]f (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."