



ADMISSIBILITY OF SCIENTIFIC EXPERT OPINION IN TOXIC MOLD CASES:

HOW ONE STATE'S DECISIVENESS CAN HELP RESOLVE ANOTHER STATE'S UNCERTAINTY

*An Analysis of New York's Modern Frye Standard and New
Jersey's Hesitancy in Choosing a Standard Through Recent
Developments in Mold Litigation*

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*"No one will deny that the law should in
some way effectively use expert knowledge
wherever it will aid in settling disputes. The
only question is as to how it can do so best."¹*

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¹ Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

I. INTRODUCTION

Nearly thirty years after the first mold case made headlines, courts are starting to see a rapid resurgence in a field that had been marginalized for a long time.² In the last decade, scientific development and public hysteria have led to an increase in the amount of toxic litigation cases filed with the courts.³ To make matters worse, natural events have created favorable conditions for this area of law to grow even more. In the near future, mold litigation might see a particularly exponential growth in New Jersey and New York due to Superstorm Sandy, which hit those states on October 29, 2012.⁴ Sandy damaged numerous structures and caused those that remained standing to become either contaminated or inaccessible due to toxic mold.⁵ New York and New Jersey are two of the states that have been most affected by the storm and are likely to experience a new wave of toxic mold litigation, and possibly a wave of public outcry related to the presence of mold. This time, possible plaintiffs may include not only occupants, but also contractors and volunteers that helped

² Thomas F. Segalla et al., *Mold: A Comprehensive Survey of Defense Strategies, Coverage Exclusions, and Liability Implications Across the U.S.*, LEXISNEXIS LEGAL NEWSROOM: INS. LAW (June 11, 2013), <http://www.lexisnexis.com/legalnewsroom/insurance/b/propertyinsurance/archive/2013/06/28/mold-a-comprehensive-survey-of-defense-strategies-coverage-exclusions-and-liability-implications-across-the-u-s.aspx>.

³ Thomas K. Hanekamp, *The Use of Expert Testimony in Mold Litigation*, 53 FED'N DEF. & CORP. COUNS. Q. 473, 473 (2003).

⁴ Amy Langfield, *A Year After Sandy, Mold a Lingering Problem for Buildings, Health*, NBC NEWS (Oct. 29, 2013), <http://www.nbcnews.com/business/business-news/year-after-sandy-mold-lingering-problem-buildings-health-f8C11488075>.

⁵ *Id.* In her article, Langfield estimated that in 2013 there were still a few hundred apartment buildings and between 2,000 to 3,000 homes in New York City that were in need of cleanup from mold infestation. *Id.* Even for buildings that appeared to be clean at first, mold may be breeding in less visible places; therefore, the numbers might be bigger than estimated in 2012-2013. *Id.* See also William A. Ruskin, *Resurgent Mold Litigation in Sandy's Wake*, LEXISNEXIS LEGAL NEWSROOM: LITIG. (Dec. 12, 2012), <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2012/12/12/william-a-ruskin-resurgent-mold-litigation-in-sandy-s-wake.aspx>. Ruskin predicts that the majority of lawsuits will arise over disagreements between remediation contractors and occupants. *Id.*

in the post-storm cleanup process.⁶ Although the storm is not responsible for all toxic mold litigation cases pending at this time—some of which were filed years before it even took place—this event contributed to bringing back the concern that often accompanies mold litigation, giving new emphasis to unresolved issues related with expert admissibility in this practice.⁷

This note seeks to evaluate a central aspect of mold litigation: causation. Given the variety of symptoms and damage caused by mold, resolution of this type of litigation is fundamentally centered upon the use of experts who attempt to trace a causal link between the damages claimed and mold.⁸ Due to the dispositive character of causation in mold litigation, an analysis of the expert admissibility tests adopted in New York and New Jersey is relevant because it may affect both judicial efficiency and justiciability.⁹ This analysis looks specifically at mold litigation because of the recent developments that have taken place in case law, both in New Jersey and New York, and also because of the prominent role that mold litigation has played in shaping the standard of admissibility of these states.¹⁰

Part I of this note briefly provides a historical background of mold litigation and its scientific and legal foundations. It goes on to explain the fundamental importance of expert opinions in the

⁶ Todd B. Bates & Jean Mikle, *Sandy Left N.J. Shore with Massive Mold Problem*, USA TODAY (Sept. 9, 2013, 8:59 AM), <http://www.usatoday.com/story/news/nation/2013/09/09/sandy-left-new-jersey-shore-with-mold-problem/2785031/>. One in ten people are allergic to mold. *Id.* In a state populated by about nine million people, like New Jersey, this would mean that about 900,000 residents are highly sensitive to the substance. *Id.*

⁷ See Segalla et al., *supra* note 2.

⁸ Hanekamp, *supra* note 3, at 473. The use of experts is necessary due to the complexity of the subject matter, which requires their opinion in order to support the causation portion of claims. *Id.*

⁹ See *infra* Part IV B. Allowing or forbidding admissibility of experts may decide the fate of a case. For example, if the standard adopted is too liberal, there will be an increase in the cases filed; however, if the standard adopted is too demanding, there is a risk that deserving plaintiffs will be unfairly dismissed.

¹⁰ See *infra* Part III.

context of mold litigation, which may often be the only way to prove causation in these types of cases.¹¹

Part II lays out the two major tests applied across states to determine the applicability of expert opinions. With the exception of a handful—one of which is New Jersey—most states in the United States follow one of two standards when determining the applicability of expert opinions: *Frye*¹² *v. United States* or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹³ This portion of the note is divided into three sub-sections that individually analyze how *Frye*, the Federal Rules of Evidence, and the *Daubert* standard came about. The majority of courts initially embraced the *Frye* standard; however, when the Federal Rules of Evidence came about—purportedly to create a more uniform and liberal test—more questions were raised, which eventually were partially clarified by the *Daubert* decision.¹⁴ Today, only some states follow the *Frye* standard, as opposed to the federally embraced *Daubert* test.¹⁵

Part III of this note considers the current state of law in New York and New Jersey. Though geographically adjacent, New York and New Jersey follow very different methodologies in determining the admissibility of expert opinions in toxic mold cases. While New York applies the *Frye* standard, New Jersey—once a *Frye* state—has for years wandered in a midpoint, showing a slight preference for the *Daubert* standard when dealing with toxic torts, and maintaining the *Frye* standard in the context of criminal cases.¹⁶ While New Jersey has shown an inclination towards *Daubert*, the state has never officially adopted the method. New York, on the other hand, has recently reaffirmed with decisiveness its adherence to the *Frye* standard in a toxic

¹¹ Hanekamp, *supra* note 3, at 473.

¹² 293 F. 1013, 1014 (D.C. Cir. 1923).

¹³ 509 U.S. 579 (1993).

¹⁴ M. Neil Browne et al., *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 23 (1998).

¹⁵ Hanekamp, *supra* note 3, at 482.

¹⁶ *State v. Doriguzzi*, 760 A.2d 336, 337, 341 (N.J. Super. Ct. App. Div. 2000) (citing *State v. Harvey*, 699 A.2d 596 (N.J. 1997)).

mold case, with the *Cornell v. 360 West 51st Street Realty, LLC*¹⁷ decision. *Cornell* described a modern application of *Frye* that appears to reduce the gap between the two major standards.¹⁸

Part IV offers a comparison between the newly clarified New York standard and the not so clear New Jersey standard, seeking to understand which approach would be better at dealing with a possible new wave of toxic litigation. Additionally, in this section the note attempts to shine as much light as possible on New Jersey's procrastination in choosing a clear standard, when the benefits of doing so appear to be numerous and the consequences of an inconsistent standard are becoming more and more visible.¹⁹ Among the arguments explored in this note is the necessity for a clear standard that would benefit the state's judicial economy by eliminating actions that do not fit the established parameters. Additionally, the note emphasizes how a uniform standard would ultimately produce uniform verdicts and reduce superfluous litigation by deterring unsupported litigants from bringing suit.

Part V finally concludes this discussion by providing a brief evaluation of the issue. The New Jersey Supreme Court Committee has been attempting to overhaul the current standard of expert admissibility and create a clear and uniform test for some time now.²⁰ Yet doubt still remains. This note argues that a comparison between the modern *Frye* standard applied in New York and the *Daubert*-like application formulated by the New Jersey Committee may put to rest the last fears that have prevented New Jersey from choosing a standard. The comparison highlights similarities between the modern applications of the standards, which appear to have more in common than just their gatekeeping function.²¹ Lastly, this note

¹⁷ 9 N.E.3d 884 (N.Y. 2014). See *infra* Part III for a full explanation of the case.

¹⁸ Michael J. Hutter, *Toxic Mold Case: Experts, Gatekeeping, Admissibility*, N.Y. L.J. (June 6, 2014).

¹⁹ See *infra* Part IV for a complete analysis of the issue.

²⁰ See *infra* note 153.

²¹ See *infra* Part V.

proposes a consideration as to whether a choice between the two main standards is truly necessary or if the only necessary decision is to establish uniform parameters.

II. WHO, WHAT, WHEN AND WHY: THE BACKGROUND

Like other toxic torts, mold litigation earns its peculiarity from the entanglement of law and science. Difficulties in the resolution of matters involving mold—as in other toxic tort—arise specifically from the broad differences between these two fields. Therefore, a brief scientific background of the origins of this tort serves to clarify questions as to the court’s role and the legal approach to mold litigation. The courts’ initial reaction to mold litigation was to follow the judgment of the appropriate scientific communities and allow the admissibility of expert opinions that dealt with theories that were “generally accepted” by peer scientists.²² However, given the novel nature and limited knowledge of mold litigation, this standard soon proved to be too strict and was replaced by a broader inquiry that tested the testimony’s reliability.²³ Regardless of preferences between the standards that were created over time, a brief introduction to the scientific origins of the issue helps to understand the limits and difficulties surrounding the adjudication of scientific theories by the legal community.

A. MOLD LITIGATION: WHERE DOES IT COME FROM?

To better understand the necessity of a standard of admissibility for expert opinions, one must delve, even if only ever so slightly, into the science that defines mold and mold litigation. Molds are fungi that grow both indoors and outdoors

²² See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (discussing the “general acceptance” standard). See *infra* Section II A for a full analysis of this standard.

²³ See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). See *infra* Section II C for a full analysis of this standard.

and thrive in warm, damp and humid conditions.²⁴ They reproduce by making spores that are able to survive even after the damp condition that led to their creation has dried.²⁵ Studies have shown that mold might affect the health of individuals who come in contact with it; however, individuals' reactions differ depending on their sensitivity to the spores.²⁶ Symptoms seem to vary from allergic reactions to lung infections.²⁷ Though recent studies have shown a possible link between spores and asthma in children, more research is required to prove a causal connection.²⁸ The causal connection between mold spores and diseases is at the heart of the scientific, as well as the legal debate on toxic mold.²⁹

Toxic tort litigation usually involves a complaint of injury, or fear of future injury, caused by exposure to a hazardous product.³⁰ Toxic mold litigation seems to have hit the courts in waves.³¹ It was first framed in a legal context in 1970 when spores incrementally began to appear in people's homes.³² In those years, construction companies sought to build structures efficiently. Yet to do so they used porous material and closely regulated airflow, creating a stuffy environment that led to mold contamination.³³ Though toxic mold claims first appeared in the 1970s, public awareness—or better, public fear—was not fully

²⁴ *Mold: Basic Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/mold/faqs.htm#affect> (last visited Nov. 15, 2015).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Reid S. Hooper, *Got Mold? Improving Plaintiff's Toxic Mold Causation Problems with the Introduction of DNA and Mycotoxin Extraction Testing*, 42 VAL. U. L. REV. 585, 586 (2008). "Causation is the primary impediment to a mold-exposed plaintiff's personal injury claim." *Id.*

³⁰ Browne et al., *supra* note 14, at 1.

³¹ Hanekamp, *supra* note 3, at 475-76.

³² *Id.*

³³ *Id.*

raised until 1994, when the CDC released a study linking mold to a condition known as acute pulmonary hemorrhage in infants.³⁴ The same study was retracted in 2000, giving start to a series of uncertainties as to the dangerous consequences caused by mold.³⁵ In 2003, a further study concluded that “there is no supportive evidence for serious illness from toxic mold in the contemporary environment.”³⁶ Yet, by the time this study came out, the public and media had already begun speculating on the issue.³⁷

Superstorm Sandy has brought the fear associated with mold back to the surface and has reminded people of the health dangers associated with it. The media began highlighting possibilities for a new wave of fear among people affected by Sandy soon after the storm.³⁸ The renewed panic may eventually lead to the filing of an increasing number of cases. Mold litigation may not be the next asbestos, however, it is a growing area of law that should not be ignored because it has the potential to deeply affect judicial efficiency and the proliferation of “junk science.”³⁹

³⁴ *Id.* at 476.

³⁵ *Id.* The hype surrounding this issue grew so much throughout the years that it allowed for the creation of its own legal share of the market. Soon after the 1994 study was released, and for years on, people began seeing mold everywhere. This phenomenon has not stopped, although companies have learned to incorporate clauses against mold litigation to protect their interest. Nevertheless, the issue still persists and cases are still filed. See U.S. CHAMBER INST. FOR LEGAL REFORM & CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., *THE GROWING HAZARD OF MOLD LITIGATION* 14 (2003) [hereinafter *GROWING HAZARD*].

³⁶ *Id.* at ii.

³⁷ *Id.*

³⁸ See Langfield, *supra* note 4.

³⁹ “Asbestos litigation is the longest-running mass tort litigation in U.S. history.” Stephen J. Carroll et al., *Asbestos Litigation*, RAND, <http://www.rand.org/pubs/monographs/MG162.html> (last visited Nov. 15, 2015). According to a study published by RAND Corporation in 2005, “Through 2002, approximately 730,000 individuals have brought claims against some 8,400 business entities . . . Defendants and insurers have spent a total of \$70 billion on asbestos litigation . . .” *Id.* Suzanne E. Riley, *The End of an Era: Junk Science Departs Products Liability*, 63 DEF. COUNS. J. 502, 502 (1996). “Junk science,” according to Riley, is a label that has been attributed to “novel scientific theories that are not based on sound foundation.” *Id.*

Mold litigation is one of many types of toxic torts that heavily rely on expert opinions to successfully pursue claims that are focused on the element of causation. Expert testimony may play a dispositive role in mass torts, complex litigation, or toxic torts (i.e., mold litigation) where causation is central to proving the case.⁴⁰ A clarification of expert admissibility in this context would affect not only mold litigation but also all other types of claims that are centered on causation.⁴¹ Causation is the essential element in a mold litigation case because there are no conclusive studies causally relating exposure to hazardous materials to the alleged injury.⁴² As such, this article evidences the necessity for a clear and uniform standard to reduce litigation and foster uniform decision-making for purposes of fairness and justiciability.

B. THE GATEKEEPERS: CAUSATION PROBLEMS AND POSSIBLE RESOLUTION

The complexity of mold litigation, and the variety of liability theories that may be offered in support of plaintiffs' claims, have made the use of experts indispensable to this area of law. Their role is primarily to suggest that exposure to airborne indoor mold cause of serious bodily harm.⁴³ Because scientific uncertainty of causation is a trait central to toxic mold litigation, courts have relied on expert opinions to distinguish legitimate claims from illegitimate ones.⁴⁴ This faithful reliance on experts creates two fundamental issues: first, as paid witnesses, experts may provide an opinion favorable to the party who has retained them. This is

⁴⁰ EMILY C. BAKER & MARY E. DESMOND, *FRYED BY ADMISSIBILITY STANDARDS: DOES THE STANDARD OF ADMISSIBILITY IN STATE COURT MAKE ANY DIFFERENCE IN PRACTICE?* 19-20 (2011), <http://www.civiljusticenj.org/wp-content/uploads/2014/04/FryedByAdmissibilityStandards.pdf>.

⁴¹ Hutter, *supra* note 18. Professor Hutter argues that the rule explained in *Cornell* will have an impact on all tort cases where expert opinion is needed to explain the mechanism of plaintiff's injury to a jury. *Id.*

⁴² GROWING HAZARD, *supra* note 35, at 19, 30.

⁴³ Browne et al., *supra* note 14.

⁴⁴ *Id.* at 19.

commonly known as the phenomenon of the “hired guns.”⁴⁵ Secondly, presenting two opposing opinions that effectively cancel each other out may further confuse the decision-makers as to the merits of the case.⁴⁶ Opposing views may not only mislead the court but, most importantly, they may influence the verdict of jury-presided proceedings.⁴⁷

In an effort to find a solution to this predicament, courts embraced the role of gatekeepers, which charged them with the duty to evaluate expert opinions’ validity and usefulness.⁴⁸ The evaluation method that was adopted by courts over the years has been shaped by their needs and preferences and is based on combinations of case law and evidence rules. The wide-ranging discretion provided to each court has led to different standards in each state. Furthermore, for states that have failed to identify a precise standard, discretion has resulted in inconsistent decisions surrounding the admissibility standard and uncertainty as to what is required of a plaintiff for them to be able to succeed in proving causation.⁴⁹

The current general standard for most states is centered on the interpretation of Federal Rules of Evidence 702 and 703, which regulate the use of experts’ theories.⁵⁰ Courts derived the power to regulate admissibility from these rules and extended it

⁴⁵ David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 74 (2008). The problem of experts adapting their opinion to the needs of their attorney is widely known and not limited to toxic tort litigation. However, the fundamental importance of expert opinions in this particular type of litigation makes the issue much more worrisome. “[P]laintiffs have no trouble finding experts who are either professional outliers or hired guns who will draw inferences of causation from the shakiest of evidence.” *Id.* For this reason, courts incur the risk of being flooded by meritless cases supported only by so called “hired guns” that can only be stopped by the court’s gatekeeping function. *Id.*

⁴⁶ Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 766 (2004).

⁴⁷ See *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733, 749 (N.J. 1991); see also Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986) (“An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous . . .”).

⁴⁸ Weinstein, *supra* note 47, at 482-485.

⁴⁹ Hooper, *supra* note 29, at 587.

⁵⁰ *Id.*

through case law.⁵¹ Rule 702 allows expert witnesses to testify on the scientific basis of issues based on their technical knowledge.⁵² Rule 703 explains the basis of admissibility of an expert and also contributes to placing the opinion in context to differentiate acceptable testimony from those that are not acceptable.⁵³

Disallowing expert opinions may be dispositive to mass torts claims because expert testimony is used to establish the nexus between the claimed injuries and agent, which in the case of toxic litigation is mold.⁵⁴ Overtime, after noticing the effects that expert opinions may lead to, courts decided to further structure their gatekeeping strategy to determine whether expert impressions were legitimate. Though expert admissibility standards differ among different jurisdictions, states generally model their expert admissibility standard after either *Frye v. United States*⁵⁵ or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵⁶ While these two standards both emphasize the role of the court as gatekeeper, the different approaches may produce different outcomes in factually similar cases.

III. FRYE V. DAUBERT: THE ORIGINS OF THE DEBATE

The main difference between the *Frye* and *Daubert* standard resides in the form of inquiry pursued by the court when

⁵¹ *Id.*

⁵² FED. R. EVID. 702. The rule is broadly phrased. See FED. R. EVID. 702 advisory committee's note to 1972 proposed rules. Using case law allows courts to narrow their application. See FED. R. EVID. 702 advisory committee's note to 2000 amendments. Rule 702 was amended in response to the Supreme Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). See *id.*

⁵³ Fed. R. Evid. 703.

⁵⁴ BAKER & DESMOND, *supra* note 40, at 19; see also Riley, *supra* note 39, at 507.

⁵⁵ 293 F. 1013 (D.C. Cir. 1923).

⁵⁶ 509 U.S. 579 (1993).

determining the validity of the expert's opinion.⁵⁷ In *Frye*, courts look for the scientific community's consensus.⁵⁸ Additionally, under *Frye*, courts are required to conduct the "general acceptance" inquiry, known as a *Frye* hearing, only when a party seeks to rely upon novel scientific, technical, or other expert concepts.⁵⁹ Therefore, when the general community or courts find the theory to be unquestionably accepted, a *Frye* determination is not pursued.⁶⁰

On the other hand, *Daubert* suggests a more complex investigation centered on the reliability of the theory, which is examined through a variety of factors.⁶¹ The analysis reviews the credibility of the expert along with the reliability of his methodology and the soundness of his conclusion.⁶² The two standards have been compared, contrasted, and criticized since the Court's decision in *Daubert* came along in 1993.

A. FRYE V. UNITED STATES

The expert admissibility saga began in 1923 with *Frye v. United States*.⁶³ The *Frye* standard was created in a criminal case and was later readapted to regulate civil cases, including what came to be known as "junk science"⁶⁴ litigation.⁶⁵ The *Frye* test was initially upheld by jurisdictions with no mention of the case

⁵⁷ Dwight A. Kern & Robert J. Kenney, Jr., *Frye Meets Parker and the Effect on Toxic Exposure Cases*, 79 N.Y. ST. B. ASS'N J., no. 3, Mar.–Apr. 2007, at 26–27.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 27.

⁶¹ *Id.*

⁶² See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁶³ 293 F. 1013 (D.C. Cir. 1923).

⁶⁴ Riley, *supra* note 39, at 504.

⁶⁵ *Id.* at 503. *Frye* was a criminal case in which the court determined that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014.

in which it was developed.⁶⁶ Nevertheless, as time went by, courts began to cite to *Frye* in criminal cases and eventually in civil cases, making it the go-to standard for expert admissibility.⁶⁷ The case required that expert opinions must earn the “general acceptance” of the scientific community specific to their practice, prior to being admissible.⁶⁸ The test vested the judges with the task of determining whether the theory had been generally accepted, but left the validity determination up to the scientific community.⁶⁹ The test provided the first barrier to scientific expert opinion, which had rarely been questioned before due to the conviction that scientists had superior knowledge.⁷⁰

The *Frye* test was based on a rather logical conclusion that experts in the scientific field would be more apt to determine the validity of a testimony; therefore, if the community accepted the theory, then it must have been valid.⁷¹ The test purported to be rather simple and straightforward—by moving the power onto the scientific community, it simply made judges bearers of a decision that had already been made.⁷² Nevertheless, problems began to appear when cases involved novel theories that the scientific community had yet to evaluate, and therefore by

⁶⁶ BAKER & DESMOND, *supra* note 40, at 19.

⁶⁷ *Id.*

⁶⁸ In *Frye*, the court expanded on this point, holding that “while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014.

⁶⁹ *Id.* The test was further defined as follows: “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.” *Id.*

⁷⁰ Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the “Gatekeeper” Function to Scientific and Non-Scientific Expert Evidence: Kumho’s Expansion of Daubert*, 34 AKRON L. REV. 689, 694-96 (2001).

⁷¹ Browne et al., *supra* note 14, at 13-14.

⁷² *Id.* at 14.

definition were not yet accepted.⁷³ All those theories were technically inadmissible according to the original application of the *Frye* test, even if they were eventually found to be scientifically valid.⁷⁴ As years went by, the *Frye* test began to be criticized for being vague and leading to inconsistent results.⁷⁵

B. FEDERAL RULES OF EVIDENCE: RULE 702

The gatekeepers' task was slightly complicated in 1975 when Congress promulgated the Federal Rules of Evidence, which purported to create a uniform, more liberal standard in evidence.⁷⁶ The rules per se did not conflict with the common law standard created by *Frye*; however, Congress' failure to include the "general acceptance" language of the widely applied test led states to question whether the two standards were mutually exclusive, and if so, which test they were supposed to apply.⁷⁷ In doubt, some states continued to follow the *Frye* standard, waiting for Congress to explicitly tell them what to do.⁷⁸ After the rules were passed, some interpreted Rule 702 as "encouraging the admission of any evidence that may help the jury."⁷⁹ This view weakened the *Frye* test, which was stricter than the new parameters. As a result, the standard of acceptable testimony was broadened.⁸⁰ Theoretically, the *Daubert* standard arrived like a knight in shining armor to save the day and lead states out of

⁷³ *Id.* at 20.

⁷⁴ *Id.* at 19-20.

⁷⁵ M. Neil Browne et. al., *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 29 (1998).

⁷⁶ Morsek, *supra* note 70, at 700-02, 724.

⁷⁷ Arvin Maskin & Isabella C. Lacayo, *Expert Evidence in the Federal Courts: A Historical Perspective*, 34 CLASS ACTION REP., no. 4, July-Aug. 2013, at ART 2.

⁷⁸ Browne et al., *supra* note 14, at 21. Although federal courts have embraced the *Daubert* standard, Congress has yet to clarify whether *Daubert* is the official standard to be followed by state courts. *Id.* at 25 n.143.

⁷⁹ Arvin Maskin & Isabella C. Lacayo, *Expert Evidence in the Federal Courts: A Historical Perspective*, 34 CLASS ACTION REP., no. 4, July-Aug. 2013, at ART 2.

⁸⁰ *Id.*

confusion. However, in practice it all turned out to be more complicated once the new test was recognized. The Court's decision in *Daubert* was interpreted by some states as supporting the idea that Rule 702 to follow the *Frye* standard.⁸¹ Overall, *Daubert* created a more elaborate analysis, but at the same time generated gaps and more questions.

C. DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.

The new standard developed in *Daubert* sought to lay down more detailed guidelines to better enforce the role of courts as gatekeepers.⁸² The *Daubert* standard shifted the question from an inquiry of acceptance to a question of reliability and relevance.⁸³ After reviewing a decision of the lower court in which the defendant prevailed due to the novelty of the theory proposed, the Supreme Court in *Daubert* explained:

“General acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

⁸¹ *Id.*

⁸² BAKER & DESMOND, *supra* note 40, at 20. With the new standard, the Supreme Court emphasized the judges' role as gatekeepers and their obligation to guard against “expertise that is *fausse* and science that is junky.” GROWING HAZARD, *supra* note 35, at ii, 22.

⁸³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). *Daubert* involved allegations that the prescription drug Bendectin, given to pregnant mothers to reduce nausea, caused two children to be born with birth defects where mothers had taken the drug during pregnancy. *Id.* at 582. Defendant Merrell Dow provided the opinion of a “well-credentialed expert” to prove the lack of correlation between the drug and human birth defects. *Id.* Plaintiff in response provided eight experts with experimental proof as to the existence of a correlation. *Id.* at 583. The experimental proof provided was new and not yet “generally accepted.” *Id.* at 583-84. The District Court of the Southern District of California granted summary judgment to defendant. *Id.* The Supreme Court reversed this ruling, creating a new standard of admissibility for expert opinions. *See generally Daubert*, 509 U.S. 579.

Pertinent evidence based on scientifically valid principles will satisfy those demands.⁸⁴

In other words, the new standard appeared to invest more power in the courts while taking ruling authority away from the scientific community, which under *Frye* had been vested as the principal critic of validity.⁸⁵ *Daubert* adopted a four-factor test that looked at: (1) whether the theory presented had been tested; (2) whether the scientific theory was peer reviewed (no publication necessary); (3) the rate of error of the scientific technique used; and (4) whether the proposed scientific evidence had been generally adopted in the relevant scientific community.⁸⁶

After the *Daubert* decision, it was clear that a new standard was coming to life; however, it was not fully clear what it would entail. *General Electric Co. v. Joiner*⁸⁷ came along in 1997 to further define the test. There, the court specified that the focus of the test had shifted from the conclusion, as in *Frye*, to both the methodology and the conclusions proposed by the experts.⁸⁸ The case pointed out that “while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the ‘gatekeeper’ role of the trial judge in screening such evidence.”⁸⁹ After *General Electric*, the court’s decision in *Kumho Tire Co. v. Carmichael*⁹⁰ came along to complete what is known as the *Daubert* Trilogy.⁹¹ Soon after the *Daubert* Trilogy

⁸⁴ *Id.* at 597.

⁸⁵ See generally *id.*

⁸⁶ Riley, *supra* note 39, at 505. The *Daubert* test did not discard *Frye*’s main inquiry, but simply expanded the test to make the parameters applicable to the most novel theories.

⁸⁷ 522 U.S. 136 (1997).

⁸⁸ *Id.* at 146.

⁸⁹ *Id.* at 142.

⁹⁰ 526 U.S. 137, 152 (1999).

⁹¹ Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 766 (2004). After *Daubert*, the court decided *General Electric* in an effort to clarify the test that had just been created. *Kumho* was decided shortly after *General Electric*, completing the

came about, the majority of federal circuit courts that until then had supported the coexistence of the the *Frye* standard and the Rules of Evidence, converted to *Daubert*, which is today the most widely adopted standard.⁹² Today, the *Daubert* Trilogy provides a methodology through which the court can determine whether a scientific expert is admissible under the Rules of Evidence.⁹³

The role of the judges under the *Daubert* standard is the same as in *Frye*; however, the gatekeeping function is exercised in a different manner. Judges under *Daubert* attempt to ascertain whether or not the studies underlying the expert's testimony have been performed following sound principles, or in other words, whether they are reliable.⁹⁴ Under *Daubert*, the judge has more responsibility in deciding what is admissible because they are the sole decision-makers establishing the validity of the expert's opinion.

IV. THE CURRENT STATE OF LAW: NEW YORK'S FRYE & NEW JERSEY'S . . .

The most difficult aspect of mold litigation is the intertwining of law and science, two completely different disciplines that adopt very different methodologies and terms.⁹⁵ Regardless of the test applied, the difficulties associated with toxic tort litigation remain. Both the *Frye* and *Daubert* standards value the role of the court as gatekeeper; however, *Daubert* seems to have introduced a more complex test that resulted in the broadening of the scope of inquiry, at times allowing a variety of theories to

infamous trilogy. This last case extended the *Daubert* holding to non-scientific experts, holding that the court's function as gatekeeper was "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom . . . the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152.

⁹² Browne et al., *supra* note 14, at 23.

⁹³ Megan Dillhoff, Note, *Science, Law, and Truth: Defining the Scope of the Daubert Trilogy*, 86 NOTRE DAME L. REV. 1289, 1290 (2011).

⁹⁴ Diana K. Sheiness, Note, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 WASH. L. REV. 481, 486 (1994).

⁹⁵ Browne et al., *supra* note 14, at 1.

come in where *Frye* would have halted them. The main difference between these two tests appears to be that *Frye* focuses more on the conclusion and the “general acceptance” of the theory in the specific field, while *Daubert* looks at the reliability and relevance of the methodology adopted.⁹⁶ Both tests look at the conclusions of each expert testimony in order to determine whether the decision could logically follow the reliable methodology.⁹⁷ Another difference between *Frye* and *Daubert* is who makes the call to determine the admissibility of the expert opinion.⁹⁸ While in *Frye* the decision appears to be mostly in the hands of the scientific community, in *Daubert* the court seems to have gained more control over the evaluation process.

The standard used by a state to determine expert admissibility influences both the amount of claims filed and the ruling of cases. A narrower standard reduces the number of claims filed because there is a lower chance of recovery. A broader standard, on the other hand, will likely cause an increase in the number of filings, even when there is very little to no proof that mold caused the injury. The case-by-case approach, combined with the possibility for a large win, will entice a plaintiff to accept the odds.⁹⁹

⁹⁶ See David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 41-42 (2013). The difference between *Frye* and *Daubert* is evident in the questions that they seek to answer. For example, while the *Frye* test revolves around a question of general acceptance of the conclusion that the expert is proposing, *Daubert* looks at additional factors, such as the reliability of the scientific conclusion (i.e., how did the expert arrive to said conclusion?). In this sense, *Daubert* appears to be more thorough. In its holding, the Court explained, “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

⁹⁷ *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 153 (3d Cir. 1999). The two tests place different weight on the conclusions. See *Daubert*, 509 U.S. at 595.

⁹⁸ BAKER & DESMOND, *supra* note 40, at 20.

⁹⁹ See Elizabeth L. Perry, Comment, *Why Fear the Fungus? Why Toxic Mold is and is Not the Next Big Toxic Tort*, 52 BUFF. L. REV. 257, 258-59 (2004). Though mold litigation was first seen in the 1970s, it was put on the radar only in the 2000s when major settlements encouraged people to file claims. *Id.* For example, between 2000 and 2001 a major insurance company settled claims related to mold litigation for over one billion dollars, opening the gates to toxic tort filings and creating the need for more detailed policies for court’s gatekeeping. *Id.*

The Court's use of different cases in conjunction with Federal Rules bestowed a great amount of discretion onto states as far as allowing expert opinion. Yet even when using slightly different methods, all states pursue the same goals when adopting a test for admissibility of expert opinion: judicial efficiency, consistent decision-making, and justice. Modern variations of both tests attempt to diminish the inquiries that derive from the lack of knowledge that connects mold to injuries claimed. New Jersey and New York are examples of two very different approaches to the same issues. New York has always applied the *Frye* standard and has recently clarified the parameters of the test application in *Cornell v. 360 West 51st Street Realty, LLC*.¹⁰⁰ New Jersey—which unofficially tends to favor the *Daubert* standard—is still struggling with determining a preference between the two main tests. New Jersey started out as an innovative state by recognizing the necessity for expert testimony gatekeeping, but failed to act upon the issue. Today, the State applies *Frye* in criminal cases, *Daubert* in some civil cases, and continues to be in a limbo when it comes to standards of admissibility in toxic tort cases.¹⁰¹ Though the push for a uniform standard in toxic tort litigation has been years into the works, the state has yet to define a standard and continues to wander in the dark, producing seemingly inconsistent decisions. Because of this, New Jersey has earned the reputation of a plaintiff friendly venue.

A. NEW YORK'S PUSH AGAINST *DAUBERT* WITH A NEW AND IMPROVED *FRYE* STANDARD

The *Frye* standard was criticized, and later deemed by many to be obsolete, because it led to inconsistent results.¹⁰² This characteristic was pinpointed to the lack of specific guidelines aside from the main requirement of “general acceptance.”¹⁰³

The sea of confusion and inconsistencies that surrounds the use of the original *Frye* standard was recently parted by

¹⁰⁰ 9 N.E.3d 884 (2014).

¹⁰¹ Martin S. Kaufman, *The Status of Daubert in State Courts*, ATL. LEGAL FOUND. 15-16 (Nov. 6, 2006).

¹⁰² Riley, *supra* note 39, at 504.

¹⁰³ *Id.*

Cornell,¹⁰⁴ a case that settled New York’s application of the test by clarifying its unclear nuances. This modern application of the standard could have resolved the issues associated with the original *Frye* test, while also overcoming faults that are usually attributed to the *Daubert* standard. The application gave a new edge to a test that had been set aside by many for being obsolete.

New York has faithfully adhered to the *Frye* standard since shortly after the case was decided. However, prior to recent decisions, New York cases had shown a slight leniency towards allowing principles commonly associated with *Daubert*, almost veering towards a hybrid test for admissibility of expert testimony.¹⁰⁵ Yet this door was shut by two major decisions: *Parker v. Mobile Oil Corp.*, 857 N.E.2d 1114 (N.Y. 2006) and *Cornell v. 360 W. 51st St. Realty, LLC.*, 9 N.E.3d 884 (N.Y. 2014).¹⁰⁶

¹⁰⁴ 9 N.E.3d 884 (2014).

¹⁰⁵ See generally *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114 (2006); *Nonnon v. City of New York*, 874 N.E.2d 720 (2007). In *Parker*, plaintiff alleged personal injury subsequent to his exposure to gasoline resulting from several years of employment with a gas company. 857 N.E.2d at 1117. Defendant moved to prevent expert testimony arguing that the testimony would be unreliable under the *Frye* standard and should be excluded for that reason. *Id.* The appellate division held that, though a correlation between exposure and the condition of plaintiff was undisputed, the methodology used by the expert was not “generally accepted” and therefore could not be admitted. *Id.* at 1112. The Court of Appeals of New York affirmed the decision. *Id.* See also *NY Court of Appeals Clarifies Standard of Admissibility of Expert Evidence*, 29 DECHERT ON POINT 1 (Oct. 2006), https://www.dechert.com/files/Publication/eac18f07-e8cf-45b9-a6c9-f7184ed66d84/Presentation/PublicationAttachment/8695fd08-a5a9-4b7a-a9f4-f8a1fb29d15c/MassTorts_updateNo.29-10-06.pdf (Last visited Nov. 15, 2015).

¹⁰⁶ Some pinpoint three cases as responsible for the shaping of the new *Frye* standard currently adopted in New York, the third case being *Fraser v. 301-52 Townhouse Corp.*, 870 N.Y.S.2d 266 (N.Y. App. Div. 2008). See *infra* note 112. In retrospect, doubts as to the admission of *Daubert* were mostly attributable to the fact that the original interpretation of *Frye* made the test inapplicable to non-scientific opinions or novel theories. The limitation remains in part. A *Frye* hearing in New York is necessary when a scientific or novel principle is presented. In New Jersey, as the court ruled in *Rubanick v. Witco Chemical Corp.*, the general acceptance standard is not appropriate when a theory is novel. Although doubts were raised, the New York court remained clear in its stand and continued to produce opinions featuring the *Frye* standard. This clarification was particularly necessary because a few of the state courts conducted *Daubert* or “blended, self-styled *Frye/Daubert*” hearings that led to confusion, especially

The clarification of the modern *Frye* standard began in 2006 with *Parker* and was finalized when *Cornell* was decided in March 2014. In *Parker* the court rejected the expert testimony stating that the methodology used to reach the conclusion proposed was not generally accepted and that, even though a link between the injury and causation was present, his testimony could not be admitted.¹⁰⁷ This case effectively extended *Frye*'s "general acceptance" analysis to the methodology adopted by the expert rather than just to the conclusion proposed. The change brought the standard closer to *Daubert*, which is usually preferred because of the focus on the reliability of the expert's methodology rather than solely on the conclusion. Prior to *Parker*, the *Frye* analysis was usually associated with a question as to "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally."¹⁰⁸ The conclusion of the court in *Parker* signaled that the *Frye* standard analysis would no longer stop at the "general admissibility" of a conclusion. Even if the conclusion is generally accepted by the scientific community, the methodology used to reach that conclusion must be analyzed and approved. More practically, this decision emphasized that guesses as to causation are no longer sufficient to grant access to expert opinions; instead specific data quantification and method explanation are now required to support an opinion.¹⁰⁹ *Parker* left some doubts as to whether the newfound similarities between *Frye* and *Daubert* would lead New York to switch and follow the

when rulings were appealed. David Paul Horowitz, "Will the Gatekeeper Let *Daubert* in," N.Y. St. B.J., 18, 19 (June 2006).

¹⁰⁷ See generally *Parker*, 857 N.E.2d at 1121.

¹⁰⁸ *Parker*, 857 N.E.2d at 1119-1120 (quoting *People v. Wesley*, 633 N.E.2d 417, 451 (1994)).

¹⁰⁹ See also *NY Court of Appeals Clarifies Standard of Admissibility of Expert Evidence*, *supra*, note 105. When the court analyzed the facts in *Parker* they looked beyond the original *Frye* analysis and focused on "whether [the experts] provided a reliable causation opinion without using a dose-response relationship and without quantifying [the plaintiff's] exposure." *Id.* Therefore, the court looked at the conclusions and methodology rather than solely to whether the theory was generally accepted by the scientific community.

federal standard.¹¹⁰ This uncertainty created a need for future clarification.¹¹¹ The New York court reaffirmed *Parker's* application of the *Frye* test in *Fraser v. 301-52 Townhouse Corp.*¹¹² In *Fraser*, the court took a step further towards the evolution of the new *Frye* standard.¹¹³ In its decision, the court explained that, although there is a connection between dampness and respiratory injuries, the association was not equal to causation.¹¹⁴ The court took its conclusion further by saying that regardless of whether the question was analyzed under *Frye* or the general inquiry applicable to all evidence, they would have reached the same conclusion and “the proffered expert evidence must be precluded on the ground that the underlying causal theory lacks support in the scientific literature placed . . . in the present record.”¹¹⁵ By stating this, the court made a clear reference to the *Frye* general acceptance requirement, reinforcing New York’s faithfulness to the application of the test. Nevertheless, the court still failed to rule out possible future applications of *Daubert*.

In 2014, in *Cornell*, the court clarified the general acceptance standard of the *Frye* test that the New York courts have been applying for several years.¹¹⁶ Depending on the viewpoint, one

¹¹⁰ Dwight A. Kern & Robert J. Kenney, Jr., *Frye Meets Parker and the Effect on Toxic Exposure Cases*, N.Y. ST. B.J., 26, 29 (Mar. /Apr. 2007). The new approach in *Parker* led the legal community to think that there was a possibility for a switch to *Daubert*. *Id.* However, the court later clarified that it was simply embracing a modern application of *Frye*. *Id.*

¹¹¹ *Id.* The new approach in *Parker* led the legal community to thinking that there was a possibility for a switch to *Daubert*, however, it was later clarified that the court was simply embracing a modern application of *Frye*. *Id.*

¹¹² *Fraser v. 301-52 Townhouse Corp.*, 870 N.Y.S.2d 266 (N.Y. App. Div. 2008).

¹¹³ *Id.* at 266. In *Fraser*, a former resident of defendant’s apartment building brought a personal injury claim for injuries allegedly caused by dampness resulting in mold infestation. *Id.* After a motion for summary judgment was filed, the court held a *Frye* hearing to determine the validity of causation in this matter. *Id.*

¹¹⁴ *Id.* at 267.

¹¹⁵ *Id.*

¹¹⁶ Hutter, *supra* note 18. In *Cornell*, plaintiff was a tenant in defendant’s building apartment. She brought a personal injury claim against defendant for

may say that the decision in this case has limited the ability of a plaintiff to prosecute cases related to mold litigation. However, from the perspective of the court, this case increased the gatekeeping efficacy of the court, thereby increasing judicial efficiency by better screening cases that lack proof of causation.¹¹⁷ The lack of general acceptance discussed in this case refers to the acceptance of plaintiff's expert testimony as support to establishing mold as cause of the claimed injury by the scientific community.¹¹⁸ This requirement usually highlights the absence of sufficient support to the causation argument presented.¹¹⁹ Failure to meet the standard of general acceptance consequently means that plaintiff would not be able to support his case because there is no connection between the disease and the presence of mold.¹²⁰ In addition, to better explain the general acceptance principle, *Cornell* emphasized the role of courts as gatekeepers and clarified the parameters of *Frye*'s application in New York.¹²¹

Ultimately, *Cornell* has placed the *Frye* test under a new light.¹²² When *Daubert* was decided, many states abandoned the *Frye* standard because it seemed strict and at the same time failed to provide adequate screening to the court to prevent the infiltration of junk science.¹²³ *Cornell* has shown that the *Frye* test may be applied in a way that guarantees the same

injuries caused by mold exposure. Coincidentally, plaintiff in *Cornell* used the same expert as plaintiff in *Fraser*. The theory of the two cases adopted by the expert was very similar and was based on the same scientific findings.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.* This same principle was also explained in *Parker*, where the New York Court of Appeals explained the necessity of diligent policing by courts when dealing with questions of reliability of expert testimony. See generally *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114 (2006).

¹²⁰ See Hutter, *supra* note 18.

¹²¹ *Cornell v. 360 W. 51st St. Realty, LLC*, 9 N.E.3d 884, 898 (N.Y. 2014).

¹²² The majority of states currently follow the *Daubert* standard because *Frye* was found to be too liberal and lacking adequate barriers to keep Junk Science out of the court. Riley, *supra* note 39, at 503. The new interpretation of this standard creates a barrier that is comparable to *Daubert*. *Id.*

¹²³ *Id.* at 505.

gatekeeping efficacy as *Daubert*. Additionally, in *Cornell*, the court addressed the ever-changing nature of scientific discovery, clarifying what was for a long time thought to be the biggest challenge to the efficacy of this standard.¹²⁴ In that regard, the *Cornell* court stated that the record addressed in a *Frye* hearing is limited to the scientific literature accepted at the time of the hearing and no later.¹²⁵ Setting a temporal boundary to the parameters of acceptability is necessary since lawsuits may last for an extended period of time during which new theories might be developed and become accepted.

The interpretation of the “generally accepted” test in *Cornell*, appears to almost reconcile the *Frye* test with *Daubert*, yet because the two standards are still distinct and separate, New York remains penalized by some of the side effects associated with refusing the federally embraced and most broadly accepted test.¹²⁶ Among similar traits, the new *Frye* test uses the “reliability” language that initially separated *Frye* and *Daubert*, in clarifying the “general acceptance” principle, stating that “*Frye* focuses on principles and methodology, but these are ‘not entirely distinct from one another.’”¹²⁷

B. NEW JERSEY’S ROAD TO THE PRESENT STANDARD OF ADMISSIBILITY

Oddly enough, New Jersey was among the first states to recognize the importance of gatekeeping in the context of expert testimony.¹²⁸ This revolutionary perception was made futile by the lack of actions taken to guarantee its enforcement. New Jersey currently does not have a defined standard of admissibility

¹²⁴ *Cornell*, 9 N.E.3d at 894.

¹²⁵ *Id.*

¹²⁶ *Id.* at 897.

¹²⁷ *Id.* (quoting *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)). Note that *General Electric* is one of the *Daubert* Trilogy cases. The *Cornell* opinion goes on to mention *Daubert* as well. See generally *Id.*

¹²⁸ *Standards for Expert Testimony*, NEW JERSEY CIVIL JUSTICE INSTT., <http://www.civiljusticenj.org/issues/standards-for-expert-testimony/> (last visited Nov. 15, 2015).

for expert opinion and stands in limbo sometimes favoring *Daubert* but at times contradicting this standard, never fully embracing it. The current standard for expert admissibility in the state is defined on an ad hoc basis and embraces the general terms of Rule 702, as adopted by the state in the early 1990s. The rule establishes the following: “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.”¹²⁹

New Jersey’s undefined standard has produced inconsistent results in cases where expert testimony is dispositive, such as toxic torts. Because of said inconsistency, this state has become a magnet for personal injury claims hoping to take a chance even when their case may not be fully supported by scientific findings and would not meet standards in other states.¹³⁰

While New Jersey has firmly adopted the *Frye* standard in criminal cases,¹³¹ civil cases have gone back and forth between stricter and more relaxed standards. New Jersey courts have cited a *Daubert*-like standard in cases dealing with toxic torts, however, the state has never officially adopted it.¹³² This lack of

¹²⁹ N.J.R. E. 702. The rule was revised before 1999 but since then has remained mostly unchanged. The standard adopted by New Jersey’s evidence rules falls outside of the widespread “*Daubert*” and “*Frye*” standard. It appears to reject *Frye*’s “general acceptance” standard, but at the same time fails to embrace *Daubert*’s multi-prong approach. Situated in a limbo-like spot, New Jersey has yet to clarify the requirement of expert admissibility.

¹³⁰ See *Standards for Expert Testimony*, *supra* note 128. McCarter & English conducted a study in 2008 that revealed that 93% of mass tort filings in New Jersey state courts were from out of state plaintiffs. The study was revisited in 2012 and revealed similar statistics. Letter to Hon. Jamie D. Happas from NJCIJ (May 6, 2014), http://www.civiljusticenj.org/wp-content/uploads/2014/05/14_May6_NJCIJ_Letter_HappasMessano.pdf (last visited Oct. 27, 2015).

¹³¹ Kaufman, *supra* note 101, at 15-16.

¹³² *Rubanick* established that a general standard of acceptance was not sufficient to grant the adequate level of screening while ensuring justiciability. *Bahrle v. Exxon Corp.*, 652 A.2d 178, 192 (N.J. Super. Ct. App. Div. 1995), mentioned *Daubert* as the applicable standard soon after the Supreme Court decided the case in 1993. However, as the New Jersey Appellate Division stated in *In re Phenylpropanolamine (PPA)*, 2003 WL 22417238 (N.J. Super. Ct. Law Div. July 21, 2003), “New Jersey courts, which had previously adhered to the

uniformity allows for a great amount of discretion to the court, which continues to apply what seems to be a case-by-case approach. For numerous years, New Jersey appeared to embrace the *Frye* standard in criminal as well as in civil cases. However, in 1991, the decision of *Rubanick v. Witco Chemical Corp.* signaled a definite move away from the “general admissibility” standard to the middle ground in which the state still stands.¹³³ Since the early 1990s, *Rubanick* has been the go-to case in New Jersey for support in expert admissibility decisions. The court in this case rejected the application of the *Frye* test, referring to it as the “conventional test” and deeming it inappropriate for toxic-tort cases.¹³⁴

Among the reasons for *Rubanick*’s rejection of *Frye* was that the “general acceptance” requirement does not allow the court to evaluate the reliability of an expert’s opinion when dealing with novel theories, and for this reason it is too stringent.¹³⁵ According to the court in *Rubanick*, the novel character of toxic mold rendered the original *Frye* approach obsolete because new, innovative theories should not have been dismissed due to their cutting edge nature, and because they had yet to be accepted.¹³⁶

The court in *Rubanick* did not dismiss the *Frye* test easily because it recognized the dangers that accompanied a less

‘general acceptance’ standard as expressed in *Frye* never adopted *Daubert*, a standard that some federal courts recognize as having restrictive results . . . it is clear that the New Jersey standard is that middle ground, ensuring fair and objective standards when correctly applied by the court.” *See also* Martin S. Kaufman, *supra* note 101, at 15.

¹³³ *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733 (N.J. 1991). In *Rubanick* the court found that an expert’s opinion “may be found to be sufficiently reliable if it is based on a sound, adequately founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field.” *Id.* at 449-50. The “scientific reliability” wording of the opinion was later found to be similar to the *Daubert* standard. *See also* Landrigan v. Celotex Corp., 127 N.J. 404 (1992) (holding that a causation theory may be accepted if based on scientifically sound data).

¹³⁴ *Rubanick*, 593 A.2d at 735.

¹³⁵ *Id.* at 738. *See* State v. Kelly, 478 A.2d 364 (N.J. Super. Ct. App. Div. 1984) (holding that an expert’s testimony should be “sufficiently reliable” to be admissible).

¹³⁶ *Rubanick*, 593 A.2d at 739.

stringent standard (i.e. ability of experts to sway the truth towards their side of the argument). The opinion stated: “the differences between the judicial and the scientific-technological processes are profound and pervasive. Failure to recognize that difference has led to judicial expressions of frustration and an unfortunate tendency to rest judicial decisions on current, and often transient, “truths” and “facts” of science and technology.”¹³⁷

The movement that began with *Rubanick* was soon bolstered by the court’s decision in *Kemp v. State*—a medical malpractice case—and most recently by *Bello v. Lexus*.¹³⁸ A recent 2014 decision recapitulated important points about the admissibility test of expert opinion in this state.¹³⁹ In *Bello v. Lexus*, the plaintiff brought a product liability suit for personal injury allegedly caused from being exposed to either mold or antifreeze from his defective vehicle.¹⁴⁰ Plaintiff appealed a decision of the lower court to not admit an expert on the premise that his opinion had not been “generally accepted.”¹⁴¹ On appeal, the court affirmed the inadmissibility of an expert opinion where the expert had merely opined on an issue.¹⁴² In that occasion, the court took the opportunity to reinstate the parameters of the New Jersey standard as currently understood.¹⁴³ As the court had previously held in *Kemp v. State*, an expert’s testimony is admissible when: (1) the intended testimony concerns an issue that is “beyond the ken of the average juror,” (2) the field in question is at “a state of the art” such that the expert’s testimony is sufficiently reliable; and (3) the witness has sufficient expertise to offer the intended testimony.¹⁴⁴

¹³⁷ *Id.* at 741.

¹³⁸ See generally *Kemp v. State*, 809 A.2d 77 (N.J. 2002); *Bello v. Lexus*, No. A-3556-12T1, 2014 WL 621126, at *1 (N.J. Super. Ct. App. Div. Feb. 19, 2014).

¹³⁹ *Bello*, 2014 WL 621126, at *1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Kemp*, 809 A.2d at 84 (quoting *Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1084 (N.J. 1992)).

In *Kemp*, the court did not adopt *Daubert* per se but cited to the case favorably, emphasizing the relevance of judicial gatekeeping to prevent the endangerment of the judicial process and promote consistency in decision-making.¹⁴⁵ In *Bello*, the court reminded everyone that “the standard for reliability has been relaxed for toxic–tort plaintiffs.”¹⁴⁶ The reason for the change, which was originally brought by *Rubanick* and continued in time, was pinned on the novel character of scientific theories concerning this subject matter, which benefit from a “methodology-based standard” rather than the generally accepted conclusion standard that *Frye* was initially interpreted to be.¹⁴⁷ The court in *Rubanick* laid out the specific reasons for the change when stating, “The purpose and function of law is to resolve disputes and to facilitate a structure for the organization of a just society—in a word, to provide justice.”¹⁴⁸ And further, that “there are areas in which judicial need for certain facts equals or exceeds the scientific community’s ability to establish them.”¹⁴⁹ Technology develops so quickly that sometimes the scientific community is unable to accept it before it comes in front of the court. For this reason, acceptance by the community is not necessarily the best measure for a theory’s validity. A better measure instead would be the ability of the expert, along with

¹⁴⁵ *Id.* at 1091. See also Letter from Marcus Rayner, Executive Director of New Jersey Lawsuit Reform Alliance to Hon. Jack M. Sabatino, *Re: Proposed Amendments to N.J.R. E 104 and 702* (Oct. 16, 2012), http://www.civiljusticenj.org/wp-content/uploads/2014/04/12Oct16_NJLRA_EvidenceCommitteeLetter.pdf (stating “If improperly admitted, expert testimony poses grave risks to the integrity of the trial process.”).

¹⁴⁶ *Bello*, 2014 WL 621126, at *1. See also *Vuocolo v. Diamond Shamrock Chem Co.*, 585 A.2d 349 (N.J. 1990) and *Koruba v. American Honda Motors Co., Inc.*, 935 A.2d 787, 792 (N.J. Super. Ct. App. Div. 2007) standing for the proposition that unfounded opinions remain inadmissible under the “traditional” (which seems to refer to *Frye*) and the “methodology based” standard (See *Kemp v. State*, 809 A.2d 77 (N.J. 2002)).

¹⁴⁷ *Bello*, 2014 WL 621126, at *2.

¹⁴⁸ *Rubanick v. Witco Chem. Corp.*, 592 A.2d 733, 741 (N.J. 1991). See also, Alan B. Handler, *The Judicial Pursuit of Knowledge: Truth and/or Justice*, 41 RUTGERS L. REV. 1, 26 (1988).

¹⁴⁹ *Rubanick*, 592 A.2d at 741.

whether the facts and data used are usually relied upon by experts in the same field.¹⁵⁰

Rubanick and *Bello* are suitable cases in this analysis, not only because they lay out the test currently embraced in New Jersey, but also because they dealt with toxic litigation and therefore facilitate a comparison with the recent New York decision in *Cornell*. In *Rubanick* the court recognized a central characteristic of toxic tort litigation, which was innovative considering that at the time this type of litigation was still somewhat novel. The court stated: “toxic-tort litigation does not frequently encounter well-established and widely-accepted scientific theories of causation that can, at the level demanded by the scientific method, previously delineate the causal path between the toxin and the pathology.”¹⁵¹ Nevertheless this field is full of reputable experts. For this reason judgment of their skills and methods is more appropriate. The court went on to state that further credibility would be given if other experts in this field would reasonably rely on the same principles.¹⁵²

The New Jersey Supreme Court Committee has been attempting to revolutionize the current standard of expert admissibility and create a clear and uniform standard for some time now.¹⁵³ The Committee has been gathering and reviewing proposals from a variety of associations that have recommended a “*Daubert*-like” standard, much like the standard that was mentioned by the court in recent decisions.¹⁵⁴ This standard involves the application of a three-prong test that allows screening the expert prior to his deposition. Marc Rayner, Executive Director of the New Jersey Lawsuit Reform Alliance,

¹⁵⁰ *Id.* at 747. Though moving away from the “general acceptance” standard, the test set forth by *Rubanick* still proposes some recognition from the specific scientific field.

¹⁵¹ *Id.* The standard proposed in this case allows testimony as long as it is proffered by an expert “who is sufficiently qualified by education, knowledge, training, and experience in the specific field of science.” *Id.*

¹⁵² *Id.* at 748.

¹⁵³ *Standards for Expert Testimony*, *supra* note 128.

¹⁵⁴ *Id.* See generally *Kemp v. State*, 174 N.J. 412 (2002), *Bello v. Lexus*, No. A-3556-12T1, 2014 WL 621126, at *1 (N.J. App. Div. Feb. 19, 2014), *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733 (1991).

featured a proposed rule in a letter to Hon. Sabatino, a current member of the Civil Practice Committee:

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, *if (1) the data and information is of the type reasonably relied on by experts in the field, (2) if the witness' testimony is consistent with reliable scientific principles and methodologies, and (3) the witness has applied these principles and methodologies reliably to the facts of the case.*¹⁵⁵

The proposed standard appears to take the currently applied approach a step further towards *Daubert* to put New Jersey in line with the system adopted by the rest of the country, as well as the federal courts. The chart below better clarifies the similarities and differences between previously applied/proposed standards by comparing their step-by-step analysis:

¹⁵⁵ Letter from Marcus Rayner, *supra* note 145 (emphasis added). Mr. Rayner stated: "If improperly admitted, expert testimony poses grave risks to the integrity of the trial process." *Id.*

Rubanick/Kemp/Bello Standard ¹⁵⁶	NJCJI Proposed Standard ¹⁵⁷	Daubert Trilogy Standard ¹⁵⁸
The intended testimony concerns an issue that is “beyond the ken of the average juror”	The data and information is of the type reasonably relied on by experts in the field	Whether theory presented had been tested;
The field in question is at “a state of the art” such that the expert’s testimony is sufficiently reliable;	If the witness’ testimony is consistent with reliable scientific principles and methodologies, and	Whether the scientific theory was peer reviewed (no publication necessary);
The witness has sufficient expertise to offer the intended testimony.	The witness has applied these principles and methodologies reliably to the facts of the case.	Rate of error of the scientific technique used;
		Whether the proposed scientific evidence had been generally adopted in the relevant scientific community.

The NJCJI proposed standard appears to be a reasonable compromise between the original interpretation of *Daubert* and the standard currently applied in New Jersey. Unlike the

¹⁵⁶ *Standards for Expert Testimony*, supra note 128.

¹⁵⁷ *Id.*

¹⁵⁸ Riley, supra note 39, at 504. The *Daubert* test did not discard *Frye*’s main inquiry, but simply expanded the test to make the parameters applicable to the most novel theories. *Id.*

Rubanick test, the proposed test places more weight on the reliability of the theory rather than the qualification of the expert, embracing the reasoning behind *Daubert*. Yet unlike *Daubert* the proposed rules take a step back from the general acceptability underlining principle that the original *Daubert* carried with it. This is likely because of the unmistakable rejection of the general acceptance principle—at least in its original form—by the New Jersey court in *Rubanick*.¹⁵⁹ Nevertheless, the test still maintains a reliability requirement with respect to other experts in the field, even if in a subtler manner. By doing so the NJCJI proposal allows for a balanced compromise.

IV. THE BEST SYSTEM FOR THE NEXT WAVE OF TOXIC MOLD LITIGATION

When comparing the *Frye* and *Daubert* standards, the similarity of their objectives becomes evident. Both tests were created to prevent unsupported evidence from entering the court and ultimately grant redress to plaintiffs that deserve it. Both tests are also imperfect and, throughout the years, were transformed in attempts to address those flaws.

When *Daubert* came along, courts decided that the new test would supersede the *Frye* test.¹⁶⁰ The approach almost placed the two tests at the opposite ends of the “admissibility” spectrum as if they could not be reconciled. But truthfully, the two tests were never completely separate. In fact, the *Daubert* test still maintained a “general acceptance” inquiry even though it was overshadowed by a bigger and broader quest for relevance and reliance.¹⁶¹ Of course, in seeking resolution to the same problem similarities in their approach are not unexpected. However, as the tests evolved to address the deficiencies that their application revealed, they appeared to move closer and closer from opposite ends to a middle ground.¹⁶²

¹⁵⁹ See generally *supra* note 135 for a full explanation of New Jersey’s rejection of “general acceptance.”

¹⁶⁰ See *supra* Part II B.

¹⁶¹ See Riley, *supra* note 39, at 504 (the *Daubert* test).

¹⁶² See *supra* author’s chart comparing standards.

Recent developments in New York’s case law have shown that *Frye* is no longer a standard to be overlooked. The *Frye* standard has often been criticized for the lack of uniformity in resulting decisions, and for unfairly limiting the courts from accepting the vanguard opinion of experts in areas of science that are continuously developing.¹⁶³ Nevertheless, the new guidelines provided by New York may even change other states’ disinclination towards this standard.¹⁶⁴ The recent *Cornell* decision revolutionized the system in place for mold claims for states applying the *Frye* standard.¹⁶⁵ This change brought to light a new and improved interpretation, whose efficacy is comparable to the *Daubert* standard. Given the similarities between the newly interpreted *Frye* test and the *Daubert* test, *Frye* may no longer be dismissed as obsolete and might even be considered a contending alternative to the *Daubert* test.

The bottom line is that the *Frye* and *Daubert* standards may not be mutually exclusive after all. Their modern applications appear to reconcile many of the differences that led states to stand on one side or the other. This reconciliation raises a question as to whether New Jersey should really choose to follow one or the other or if a uniform standard is all that is really needed. This is a relevant inquiry because the either-or dilemma that was created over the years might be a contributing factor to New Jersey’s delay in picking a side in this debate.

The similarities of the modern applications of *Frye* and *Daubert* become visible when comparing the New York test and New Jersey’s current approach. New Jersey’s current inquiry as to whether “comparable experts accept the soundness of the methodology,” seems to be similar to the modern application of *Frye*.¹⁶⁶ Yet the standard openly rejects reliability solely on general acceptance and embraces certain aspects of *Daubert*.¹⁶⁷ Similarly, New York’s standard, which openly rejects *Daubert*,

¹⁶³ Riley, *supra* note 39, at 503. The *Frye* Standard has often been criticized because of its vagueness and for conferring too much deference to the court. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Hutter, *supra* note 18.

¹⁶⁶ *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733, 748 (N.J. 1991).

¹⁶⁷ *Id.*

appears to embrace certain aspects of that test when citing some of the *Daubert* trilogy cases and using language mentioning “reliability.”¹⁶⁸ Much like New York, New Jersey still refuses to admit “expert’s base opinion that has no support in factual evidence or similar data.”¹⁶⁹

A. PROS AND CONS OF THE FRYE AND DAUBERT

Both New York’s modern *Frye* standard and the New Jersey’s *Daubert*-like proposal offer pros and cons to “junk science” prevention and help enforcing the gatekeeping function of the court. A layer of subjectivity from the individual states will inevitably accompany a determination of which one is a better standard among the two. Nevertheless, an objective evaluation might help New Jersey’s decision-making.

Should New Jersey opt to follow a *Daubert* inspired standard, it would be joining the large majority of states. On the other hand, should the state opt to adopt a *Frye* standard that is similar to what New York has adopted, it would return to a uniform standard across both criminal and civil cases.¹⁷⁰ As New York has recently proven, the *Frye* standard is still alive. Its plasticity has allowed for a modernization that fits the needs of law today, over ninety years after the decision of the court. Furthermore, New Jersey’s application of the *Frye* standard in criminal as well as other limited types of cases and a pseudo-*Daubert* standard in other types of cases, results in confusion that may be avoided if the differences could be reconciled in one standard.¹⁷¹

¹⁶⁸ See *Cornell v. 360 W. 51st St. Realty, LLC*, 9 N.E.3d 884, 896-97 (N.Y. 2014).

¹⁶⁹ *Pomerantz Paper Corp v. New Cty. Corp.*, 35 A.3d 221, 237 (N.J. 2011). “The net opinion rule precludes experts from expressing bare conclusions, unsupported by factual evidence.” *Smith v. Northridge at Edison*, No. A-2482-07T1, 2009 WL 3459867, at *6 (N.J. Super. Ct. App. Div. Oct. 6, 2009) (citing *Buckelew v. Grossbard*, 435 A.2d 1150 (1981)).

¹⁷⁰ See generally *State v. Doriguzzi*, 760 A.2d 336 (N.J. Super. Ct. App. Div. 2000); see also *Bello v. Lexus*, No. A-3556-12T1, 2014 WL 621126, at *1 (N.J. Super. Ct. App. Div. Feb. 19, 2014) (refusing to admit the expert opinion because the expert had failed to provide sufficient support to the proposed ideas).

¹⁷¹ *Doriguzzi*, 790 A.2d at 337 (citing *State v. Harvey* 699 A.2d 596, 619 (N.J. 1997)). New Jersey courts tend to apply the *Daubert* standard to toxic litigation

Nevertheless, states following *Frye* remain a minority and oppose the federal government, which has openly embraced the *Daubert* standard. Irrespective of the court's strong hold on pushing forward the *Frye* standard, judges in federal court still have to review cases decided following the *Daubert* standard.¹⁷² This leads a strong standing *Frye* court to discuss the weakening of *Daubert's* strong hold—that the court has so vigorously attempted to maintain—creating confusion. New Jersey has also by and large rejected the “general acceptance” standard in *Rubanick*—as well as in subsequent cases—considering the standard too strict for toxic tort litigation.¹⁷³

Neither standard is free of faults. According to the American Association for the Advancement of Science and the National Academy of Science, the *Daubert* standard is not free of manipulation just because it requires more explanations.¹⁷⁴ In fact, an in-depth analysis of the two standards shows that they might be very much alike, and that although an analysis under *Daubert* might sound more impressive to a judge or a jury, the two share similar faults.¹⁷⁵ Both standards fail to resolve the “hired gun” danger. No matter what standard is adopted, the

and the *Frye* standard to other cases requiring the admissibility of expert opinions. Kaufman, *supra* note 101, at 15-16.

¹⁷² Horowitz, *supra* note 106, at 19. The court in *Parker* mentioned that “although federal courts use the broader *Daubert* test instead of the *Frye* standard in connection with determining the admissibility of scientific expert testimony, it is instructive to examine federal authority for purposes of discussion of accepted scientific methodology.” *Id.* (quoting *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1119 (2006)).

¹⁷³ See *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733, 735 (N.J. 1991).

¹⁷⁴ The American Association for the Advancement of Science and the National Academy of Science in their amicus brief said: “a new theory or explanation must generally survive a period of testing, review, and refinement before achieving scientific acceptance. Brief for The American Association for the Advancement of Science and the National Academy of Science et al. as *Amici Curiae* at 7-8, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), 1993 WL 13006281, at *13. This process does not merely reflect the scientific method, it is the scientific method.” *Id.* See also Thomas Lyons, *Frye, Daubert and Where Do We Go From Here?*, STRAUSS, FACTOR, LAING & LYONS, <http://www.sfandllaw.com/Articles/Frye-Daubert-and-Where-Do-We-Go-From-Here.shtml> (last visited Nov. 16, 2015).

¹⁷⁵ *Id.*

danger for inadequate testimony for the purposes of a payday always lingers. *Frye* jurisdictions arguably eliminate a small chance of the issue by requiring a “general acceptance” by the scientific community, which takes some of the power away from the individual expert. But theoretically, an expert will always be able to find some support for his theory even if the majority of the community disagrees. To the *Rubanick* court in New Jersey the response to this issue is increased judicial vigilance, an approach that indirectly embraces the *Daubert* standard by empowering the judge as an active gatekeeper.¹⁷⁶

B. SO WHY SHOULD NEW JERSEY CHOOSE?

Regardless of which standard is ultimately adopted by New Jersey, an agreement must be reached because the benefits of a uniform standard are overwhelming. Recent studies have shown that the lack of a uniform standard in New Jersey has led to an increase in toxic tort cases filed in the state.¹⁷⁷ A great majority of toxic tort cases filed in New Jersey in the past years were brought by out-of-state plaintiffs.¹⁷⁸ This trend is attributed to a general awareness that the lack of a uniform standard in New Jersey would facilitate the redress of plaintiffs, even when their cases are not strongly supported by proof of causation. A defined standard would promote judicial efficiency by pushing away cases that do not meet the standard of the state and deterring forum shopping.

¹⁷⁶ See *Rubanick*, 593 A.2d at 750 (“[T]he response should consist of greater judicial vigilance in scrutinizing the status of the expert and in directing the fact finder to those factors that bear relevantly on the expert’s credibility.”).

¹⁷⁷ McCarter & English conducted a study in 2008 that revealed that 93% of mass tort filings in New Jersey state courts were from out-of-state plaintiffs. The study was revisited in 2012 and revealed similar statistics. *Letter to Hon. Jamie D. Happs from NJCIJ*, *supra* note 130.

¹⁷⁸ *Id.*

V. CONCLUSION: WILL IT BE *FRYE* OR *DAUBERT*?

The volume of claims filed across the nation evidences the relevance of toxic mold litigation in recent years.¹⁷⁹ Recent events have made New Jersey and New York more susceptible to the next wave of litigation. For this reason, a clarification in the standard of expert admissibility seems to be important, now more than ever, especially in anticipation of future claims. The recent decision in *Cornell* has elucidated the type of benefits associated with a clear standard. The modern application of the *Frye* standard in New York has also revealed an inclination towards accepting the reliability question proposed by *Daubert*. The same pattern is discernible in recent applications of *Daubert* and *Daubert*-like standards, which have shown a consideration as to the scientific community's opinion of experts' theories.

A comparison of New York and New Jersey standards of admissibility has further revealed that a uniform and clear standard may contribute to maximizing judicial efficiency and fairness of decision. Additionally, setting a new standard may revolutionize more than just mold litigation. Different approaches to the causation element may reduce or delay litigation time—depending on the standard adopted—for not only mold litigation but also for all cases requiring experts to prove causality. Therefore, while a uniform standard is a necessity, choosing to follow *Frye* or *Daubert* may not bear the significance that it once did. If New Jersey were to choose, however, the state's rules and prior case law show that adopting *Daubert*, at least as a formality, would make for a smoother transition. Accordingly, the current proposal by the New Jersey Civil Justice Institute appears to be a most suitable compromise for this state.

¹⁷⁹ *Id.*