

DIMOND, NOT *DAUBERT*: REVIVING THE DISCRETIONARY STANDARD OF EXPERT ADMISSION IN ALASKA

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ABSTRACT

The law regarding the admission of expert testimony in Alaska has undergone considerable change within the last few years, largely as a result of the influence of federal law. This Article explores both the background of Alaska and also charts the development of the law following a series of influential federal cases. After reviewing this history, the author advocates allowing trial courts broader discretion to exclude experts, but without reliance on particular federal holdings. This discretion, the author argues, has been an integral part of a uniquely Alaskan approach to expert testimony, but has, unfortunately, been retracted in reaction to recent federal rulings.

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INTRODUCTION

How trial courts evaluate and admit expert testimony in Alaska has come under increased scrutiny in the past decade. A number of landmark decisions by the United States Supreme Court in the 1990s marked a change in the direction taken by federal courts and seemed to signal the beginnings of a similar shift in Alaska's courts. However, after initially accepting the federal approach of *Daubert v. Merrell Dow Pharmaceuticals*,¹ the Alaska Supreme Court rejected subsequent developments in the federal approach.² The Alaska Supreme Court has gone far in its rejection of what it has perceived as a trend towards judicial intervention into the jury's fact-finding role. This rejection has thrown into doubt the traditional role of trial courts as gatekeepers of proffered expert evidence. Unless the expert is offering a novel scientific theory, the trial court no longer appears to have the authority to verify the existence of sound methodology underlying the expert's opinions, or to bar those opinions which have no reasonable or logical basis. Under current law, experts in Alaska must show only minimal personal qualifications to be able to present an opinion to the jury, even if that opinion has no basis in sound methodology or utilizes no methodology at all. Any witness with bare-bones qualifications can proffer almost unlimited testimony within the broad and largely self-defined parameters of his expertise.

The Alaska Supreme Court's reaction to the federal developments, though based on a justified concern about putting judges in the role of fact finder, has ultimately done a disservice to court and jury alike. It is not sufficient to require disputes over expert methodology to be resolved by adversarial process before a jury. Juries are only given a limited set of facts and are not in a position to make admissibility determinations. Leaving the matter solely to the adversarial process

1. 509 U.S. 579 (1993).

2. See *infra* Part III.B.

invites an arms race of experts and the use of “hired gun” experts to voice whatever opinion is needed.

Yet the Alaska Supreme Court need not blindly follow or automatically adopt either the federal standard or the broad exclusionary approach that they have taken. All that is needed is a return to the common-sense, discretionary standard that held sway in this state long before the current battle over *Frye v. United States*,³ *Daubert*, and *Kumho Tire Co. v. Carmichael*⁴ found its way into Alaska courts. At the same time, Alaska could stay clear of the more invasive approach utilized by some of the federal courts. Thus, where an expert is able to voice a reasonable basis for an opinion that fairly fits the facts of the case and would be helpful to the jurors, the expert ought to be able to testify. There is no need for trial courts to substitute their own judgment for the judgment of the juries. Courts, however, should be permitted and encouraged to exercise their discretion to bar opinions which are based on pure guesswork or which lack the support of sound and logical methodology. Furthermore, trial courts should be given sufficient leeway to exclude those opinions which are within the comprehension of the jury, and therefore relate to facts which the jury needs no expert help in weighing.

In Parts I and II, this Article examines the development of the federal standard for admission of expert testimony and contrast it with Alaska’s development. As will be shown, the two tracks have crossed at critical points, but each has its own standards and practices. In Part III, the Article explores emerging conflicts between the federal rules and Alaska’s practices. Finally, this Article will argue that this conflict is largely unnecessary because it is merely based on misunderstandings of the federal system and a failure to draw from the wisdom of Alaska’s own precedent.

I. CREATION OF THE FEDERAL STANDARD FOR ADMISSION OF EXPERT TESTIMONY

It is useful for our purposes to examine exactly how the conflict resolved by *Daubert* and *Kumho Tire* arose and to distinguish between the general rules of expert admission and the particular rules pertaining to novel scientific evidence. The famous *Frye* opinion forms part of the backdrop to the problem. In that case, the court of appeals was asked to review the exclusion of expert testimony regarding a primitive blood-

3. 239 F. 1013 (D.C. Cir. 1923).

4. 526 U.S. 137 (1999).

pressure based lie detector.⁵ The court, with minimal discussion or reasoning, held that “the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.”⁶ It is surprising that such a short and terse opinion would set the standard for admission of novel scientific theories for decades to come, but that is more or less what happened. Courts nationwide cited *Frye* and created the “*Frye* standard.” Under this approach, the admissibility of a novel scientific theory was tied to its acceptance in the scientific community. Opinions based on a theory, however reliable, that had not yet obtained “general acceptance” were excluded.⁷

The *Frye* approach was brought into question by the creation and adoption of new codified evidence rules by the federal courts and many states. These new rules included the following provision on the admission of expert witnesses:

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 . . .⁸

The rules further stated that “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court.”⁹

A faction of commentators and federal courts found a “gatekeeping” requirement implicit in these rules.¹⁰ Under this approach, the court has authority to assess preliminary admissibility, and Rule 702 of the Federal Rules of Evidence implies that to be admissible the proffered testimony must take the form of “scientific,

5. *Frye*, 239 F. at 1013.

6. *Id.* at 1014.

7. See, e.g., *United States v. Tranowski*, 659 F.2d 750, 756 (7th Cir. 1981) (rejecting the chart of an expert astronomer in a perjury trial over a false photograph where “the technology . . . relied on was not ‘sufficiently established to have gained general acceptance in the particular field to which it belongs’”) (quoting *Frye*, 239 F. at 1014).

8. FED. R. EVID. 702.

9. FED. R. EVID. 104(a).

10. See, e.g., *United States v. Hope*, 714 F.2d 1084, 1087 n.3 (11th Cir. 1983) (noting that “[t]he helpfulness test of Rule 702 . . . cast doubt on the continued vitality of *Frye*” and discussing the emerging split in circuits); see also Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980).

technical, or other specialized knowledge.”¹¹ If the testimony is simply an unsupported assertion, then it cannot fit this basic definition and must be excluded.

The conflict came to a head in *Daubert*.¹² There, the United States Supreme Court faced the admissibility of an expert’s scientific opinion as to whether Bendectin was a teratogen.¹³ The district court heard extensive argument and expert testimony criticizing the methodology of the plaintiff’s expert and ultimately held that “[g]iven the vast body of epidemiological data concerning Bendectin, . . . expert opinion which is not based on epidemiological evidence is not admissible to establish causation.”¹⁴ The court of appeals affirmed, citing the *Frye* general acceptance standard. The Supreme Court reversed, holding that Rule 702 had replaced the “austere” *Frye* standard.¹⁵ The Court held that under the new standard set by the rules, “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”¹⁶

It is important to remember that the *Daubert* Court uses the term “reliable” to refer to the specific and narrow concept of “evidentiary reliability.”¹⁷ The Court was not using the term “reliability” in its broader sense, and certainly an expert’s methodology that satisfies baseline evidentiary reliability can still be found unreliable or even unbelievable by the trier of fact. Under *Daubert*, trial courts are instructed to undertake “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”¹⁸ They are not to substitute their own determination of weight or credibility for that of the jury.¹⁹

To assist in this preliminary assessment, the *Daubert* Court created its now-famous factors.²⁰ These called for the trial court, after assessing the basic “fit” of the proffered testimony, to verify whether the scientific theory had been subjected to empirical testing, peer review and publication, its known or potential error rate, and its general acceptance

11. FED. R. EVID. 702.

12. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

13. Bendectin is a drug prescribed to alleviate the symptoms of morning sickness, later pulled from the market. A teratogen is a drug or substance which causes birth defects. *Id.* at 582.

14. *Id.* at 583–84.

15. *Id.* at 589.

16. *Id.*

17. *Id.* at 590 n.9.

18. *Id.* at 592–93.

19. *Id.*

20. *Id.* at 593.

by the relevant scientific community.²¹ The Court noted that these were not “a definitive checklist or test.”²² Subsequently, Rule 702 was modified.²³ The drafting committee recommended consideration of five flexible factors:

- (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- (3) Whether the expert has adequately accounted for obvious alternative explanations.
- (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.²⁴

The *Daubert* Court admonished courts below that “the focus, of course, must be solely on the principles and methodology, not on the conclusions that they generate.”²⁵ This caveat was the subject of challenge in the next major United States Supreme Court case to analyze the admission of expert testimony, *General Electric Co. v. Joiner*.²⁶ There, the Court noted that:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.²⁷

21. *Id.*

22. *Id.*

23. *See* FED. R. EVID. 702 (2000 Amendment).

24. *See id.* (Committee Notes on Rules—2000 Amendment) (internal citations and quotations omitted).

25. *Daubert*, 509 U.S. at 595.

26. 522 U.S. 136 (1997).

27. *Id.* at 146.

This opinion has served as authority for excluding an array of “hired gun” experts who churn out the same basic conclusion in response to whatever facts happen to be at bar.²⁸

The next major decision on admission of expert testimony was *Kumho Tire*.²⁹ The question before the Court was whether the *Daubert* factors could be applied to non-scientific experts. The Court held that Rule 702’s gatekeeping obligation applied to all experts, not just those with “scientific” knowledge.³⁰ The *Kumho Tire* court noted that the *Daubert* list of factors is flexible and “neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.”³¹ In this case, the Court examined the proffered testimony of Carlson, a tire failure analyst, in detail.³² Based on a physical examination and “experience,” Carlson opined that a defect in the tire, not the owner’s misuse, caused a separation.³³

The trial court initially excluded Carlson’s testimony, but the court of appeals reversed on the grounds that *Daubert* applied only to “scientific” experts and not to experts whose conclusions were based on “experience.”³⁴ The Supreme Court reversed the Eleventh Circuit decision and upheld the original trial court determination.³⁵ The Court noted that trial courts must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”³⁶ The Supreme Court itself engaged in a scrutiny of Carlson’s methodology and found numerous discrepancies and shortcomings.³⁷

28. See, e.g., *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (holding that *Daubert* is “germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers”); *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996) (“In all cases . . . the district court must ensure that it is dealing with an expert, not just a hired gun.”).

29. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

30. *Id.* at 141–42.

31. *Id.*

32. *Id.* at 144.

33. *Id.*

34. *Id.* at 146 (citing *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997)).

35. *Id.* at 151.

36. *Id.*

37. *Id.* at 154–55. For example, the Court noted that Carlson’s methodology was based on his two-factor “tactile” examination of the tire, a method without

The impact of this line of cases has been felt far beyond the federal court system. As of this writing, a majority of states have abandoned the *Frye* standard in favor of *Daubert* or some modified version of *Daubert*.³⁸ The *Kumho Tire* decision remains more controversial than *Daubert*, and its adoption has been spottier. Commentators give varying reports on the progress of its adoption. Some are quite sanguine.³⁹ Others report only a minority of states have gone along with the full federal approach as represented by *Daubert*, *Joiner* and *Kumho Tire*.⁴⁰ Alaska's own supreme court viewed *Kumho Tire* as restricting access to the courts.⁴¹ But there is absolutely nothing in the language of the case that makes it "liberal" or "conservative," nor does the case mandate exclusion of experts. It gives trial courts discretion to keep the proverbial "gate" up against experts unless they have something useful to add and have at least a modicum of reliable methodology to support their conclusions. There is no reason it should be a bar to litigants at all.

II. ALASKA'S PRE-DAUBERT STANDARD: THE EXPERT WITNESS IN ALASKA FROM STATEHOOD

To see where Alaska's standards for expert testimony ought to head, it is useful to remember where they started. The earliest opinions are not frequently cited in the context of adopting the latest

any support from other experts. *Id.* The court also noted inconsistencies in his methods and contradictions in his testimony about his conclusions. *Id.*

38. See Robert J. Goodwin, *Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 CUMB. L. REV. 231, 267 (2004-2005) (noting that "many states have found *Daubert's* interpretation of the way the Federal Rules of Evidence regulate expert testimony to be persuasive, and a majority of states have adopted *Daubert* or a test consistent with *Daubert*.").

39. Robin Jean Davis, *Admitting Expert Evidence in Federal Courts and its Impact on West Virginia Jurisprudence*, 104 W. VA L. REV. 485, 502 n.84 (2002) ("[A] majority of the states that have addressed the issue have adopted the *Kumho/Daubert* test.").

40. Steven B. Hantler, Mark A Behrens & Leah Lorber, *Is the "Crisis" in the Civil Justice System Real or Imagined?* 38 LOY. L.A. L. REV. 1121, 1172-73 (2005) ("A number of states have adopted *Daubert*, but a significant number have not. In a recent survey of state evidence law, it was found that only ten states have adopted all three holdings in the *Daubert* trilogy. Six states have adopted *Daubert* and *Kumho Tire*, but not *Joiner*. Eight states have adopted *Daubert*, but not *Kumho Tire* or *Joiner*. Five states, while not fully adopting *Daubert*, use the *Daubert* principles in their own tests. Eight states follow neither *Daubert* nor *Frye*. The remaining states still apply *Frye*." (citations omitted)).

41. See *Marron v. Stromstad*, 123 P.3d 992, 1005-06 (Alaska 2005); see also *infra* Part III.B.

groundbreaking federal opinion.⁴² However, these opinions offer a distinctly Alaskan approach that, grounded in common sense, has much to recommend it. These decisions did not use the current lingo or insist on formal “*Coon* hearings,” “*Daubert* hearings” or any other wooden mechanisms for pretrial analysis. The analysis typically took place in the context of examining an expert’s “qualification,” but went well beyond a simple review of licenses and personal background. The courts in these early cases were in fact engaged in a gatekeeping analysis without calling it that. The current confusion about how trial courts should evaluate proffered expert testimony could be greatly reduced by a return to this approach. The particular terms used or factors relied upon are far less important than reviving the basic notion that Alaska’s trial courts should have a relatively free hand to block baseless or unreliable expert opinions.

A. The Origins of the Approach: *Oxenberg v. State*

The Alaska Supreme Court’s first significant inquiry into the admission of expert testimony came in *Oxenberg v. State*.⁴³ Oxenberg, who had been convicted of arson, challenged the propriety of admitting the Territorial Fire Marshall as “an expert witness on the subject of fires.”⁴⁴ The Fire Marshall conducted an investigation and concluded that the fire “was of incendiary origin, and he followed this by testifying in detail as to the facts upon which his opinion had been formulated.”⁴⁵ Oxenberg argued that the jury was fully capable of determining the origin of the fire without expert assistance, and that allowing an expert to testify on the matter would constitute “an invasion of the province and function of the jury and a substitution of the expert’s opinion for that of the jury on the ultimate issue to be decided.”⁴⁶

Justice Dimond, writing for the court, considered the issues in balance:

If this was a matter of such common experience and understanding that the jury could decide the question without receiving assistance by way of an opinion from some other person, then the opinion evidence should have been excluded

42. As we shall see, the most recent opinions from the Alaska Supreme Court discussing *Daubert* and *Kumho Tire* do not appear to regard these early cases as having any bearing on the question of gatekeeping.

43. 362 P.2d 893 (Alaska 1961).

44. *Id.* at 900.

45. *Id.*

46. *Id.*

because it would be superfluous. But if under the particular circumstances related here the jury could receive appreciable help or assistance from the opinion of the expert witness, then his testimony was admissible.⁴⁷

The court upheld the trial court's decision to admit the testimony, explaining that "[q]uestions as to the admissibility of expert testimony should be left to the wise discretion of the trial judge."⁴⁸ The court reasoned that in the particular circumstances of the arson case, the origin of the fire "could not have been properly understood or determined without the aid of an opinion from a person of special knowledge and experience."⁴⁹ The Territorial Fire Marshall had this experience, and "had a sufficient acquaintance through personal observation and other means of investigation to enable him to express an opinion."⁵⁰ As to the propriety of an expert opinion on the ultimate issue, Justice Dimond noted that under the new "Uniform Rules of Evidence" under review by the National Conference of Commissioners on Uniform State Laws, experts were permitted to testify as to the "ultimate issues."⁵¹

The *Oxenberg* opinion is probably best known in Alaska today for being one of the seminal opinions on corroborative testimony in criminal cases.⁵² It is fascinating to see, however, that all the basic elements involved in the admission of expert testimony in a modern federal case were present in the court's reasoning, including the concept of the gatekeeping role itself. Thus, although the case was decided prior to the adoption of the uniform Federal Rules by Alaska's courts, the *Oxenberg* court's reasoning set an excellent foundation for those rules.

Though the opinion is short, it is apparent that Justice Dimond envisioned several critical components to expert admission. First, there was the underlying notion that the trial court has broad discretion to allow a proffered expert to testify.⁵³ The court reviewed the choice as a matter of discretion and implied that such discretion would not be overturned absent a showing, as explained by subsequent decisions, that the "reasons for the exercise of discretion are clearly untenable or

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at n.20.

52. *See, e.g.,* Pulakis v. State, 476 P.2d 474 (Alaska 1970); Bodine v. State, 737 P.2d 1072 (Alaska Ct. App. 1987); Pickens v. State, 675 P.2d 665 (Alaska Ct. App. 1984).

53. *Oxenberg*, 362 P.2d at 900.

unreasonable.”⁵⁴ Second, the *Oxenberg* court understood that only a witness with suitable and applicable training and/or experience could testify.⁵⁵ The Territorial Fire Marshall was established as such a witness to the satisfaction of the trial court because of his experience in the field.⁵⁶ Third, the court noted that this particular expert actually investigated the case at hand.⁵⁷ It is strongly implied, if not spelled out, that this was a hands-on investigation and not merely a review of records.⁵⁸ Fourth, the court noted that the opinion must help the trier of fact.⁵⁹ If the opinion did nothing more than state a conclusion “of common experience and understanding,” then the opinion would be excluded as superfluous.⁶⁰

Both the trial court and supreme court looked at who the expert was, what his opinion was, what kind of review his opinion was based on, and whether the jury actually needed expert help. At the same time, the supreme court did not chide the trial court for taking a look at the expert’s basic methodology (though they did not use that term), nor did they forbid the trial court from second-guessing the decision of a party to offer an expert’s testimony. The supreme court’s decision implied that the trial court had discretion to exclude this qualified fire marshal if either the jury did not need his assistance or if he never actually investigated the matter.

B. The Development of the Standard

The discretionary standard of expert admission established in *Oxenberg* was developed and expanded in the decades before the furor over *Frye*, *Daubert*, and *Kumho Tire*. In *Ferrell v. Baxter*,⁶¹ the trial court allowed Rudy Voight, an acknowledged expert on automobile accidents, to testify, but limited his opinion greatly.⁶² The trial court barred admission of his opinions as to the truck’s speed, the “tracking

54. *Lewis v. State*, 469 P.2d 689, 695 (Alaska 1970).

55. *Oxenberg*, 362 P.2d at 900 (“[T]he witness was qualified to express an opinion on the matter in issue.”).

56. *Id.*

57. *Id.* (“The record not only bears out those determinations, but also shows that the witness had a sufficient acquaintance through personal observation and other means of investigation to enable him to express an opinion.”).

58. *Id.* (noting “personal observation” as part of inspector’s methodology).

59. *Id.* (“[T]he origin of the fire could not have been properly understood or determined without the aid of an opinion from a person of special knowledge and experience.”).

60. *Id.*

61. 484 P.2d 250 (Alaska 1971).

62. *Id.* at 269.

tendencies of the trailer” and the trailer’s location relative to the center of the road at impact.⁶³ The basis for these rulings was said to be Voigt’s lack of qualification and his impermissible attempts to testify to the ultimate issue.⁶⁴ Whether that was the whole story or not, the Alaska Supreme Court ostensibly reviewed these exclusions simply as a test of Voigt’s qualifications to testify.⁶⁵ On that basis, they upheld the trial court’s exclusion.⁶⁶

A more detailed look at the *Ferrell* court’s reasoning reveals that, as in *Oxenber*, the court’s analysis of Voigt’s opinion involved a good deal more than merely a checking of baseline qualifications. For example, in determining whether Voigt could be allowed to arrive at a conclusion regarding the speed of the collision based on a post-accident photograph, the Alaska Supreme Court reasoned:

We can find no showing in the record to indicate that Mr. Voigt had “reasonable contact with the subject matter” under discussion. Mere observation of numerous accident scenes after the fact would not necessarily make him an expert in this field. Nor would extensive driving experience give him the knowledge to tell from a photograph the speed of the vehicles involved.⁶⁷

The court is clearly going beyond a mere qualification inquiry in this case, especially in light of the fact that Voigt had experience with accident investigation and had been qualified to testify in previous cases. If he was unqualified, why was he allowed to offer *any* testimony? Furthermore, the “subject matter” at issue in a genuine dispute over qualification would be a great deal broader than a particular accident scene. One would expect an attack on his lack of training or experience. The challenge here was more specific: whether Voigt could be permitted to look at some photos, make his own experience-based assessment, and announce a speed. The trial court forbade this, and the Alaska Supreme Court upheld that decision. Yet in substance, this exclusion bears a striking similarity to the sort of free-ranging, discretionary analysis allowed under the flexible factors approach of *Kumho Tire*.⁶⁸

63. *Id.* at 268-69.

64. *Id.*

65. *Id.*

66. *Id.* at 268.

67. *Id.*

68. *See, e.g., Weaver v. Blake*, 454 F.3d 1087, 1090-92 (10th Cir. 2006) (affirming district court opinion regarding officer’s expert opinion on point of vehicle collision and which vehicle crossed the yellow line); *Cobb v. Dawson*, No. 5:06-cv-066 (HL), 2007 U.S. Dist. LEXIS 91177, at *14 (M.D. Ga. Dec. 12, 2007) (considering challenge to expert’s opinion on impact and braking speeds under

Likewise, the *Ferrell* court's discussion of the trailer's precise position sounds a lot more like a reliability analysis under *Daubert* and *Kumho Tire* than an initial review of "qualifications." As the court stated:

Similarly, we find no merit in appellants' third contention of error that Mr. Voigt should have been permitted to answer a question expressing an opinion as to the location of the rear of the trailer relative to the center of the road at the time of impact. Although the basis for the question was to be Voigt's observation of the truck, tracks and point of impact at the scene, it called for more than his observations. It also asked Voigt's opinion. To give his opinion, Voigt had to qualify as an expert able to determine the position of the vehicles at the time of the collision based on a view of the scene after the accident. We are not persuaded that the trial court abused its discretion in finding that Mr. Voigt did not possess sufficient knowledge to assist the jury in determining this issue.⁶⁹

Though couched in terms of Voigt's "qualification," the particular opinion at issue was a classic *Daubert* issue—an expert's opinion arising from an inspection of the scene combined with prior experience. Because this was well before both *Daubert* and Alaska's adoption of the Federal Rules of Evidence,⁷⁰ it is not surprising that the analysis was couched in terms of "qualification." But the analysis essentially determined whether a particular expert had any reliable basis for coming to his particular conclusions. In this case, the expert did not have a reliable basis for his conclusions and was rightly rejected.

Another example of the early Alaska approach can be found in *Fairbanks v. Nesbett*.⁷¹ In *Nesbett*, the court upheld exclusion of a

flexible factors approach and deeming it "unorthodox" but admissible under the circumstances); *Olson v. Ford Motor Co.*, 411 F. Supp. 2d 1137, 1143 (D.N.D. 2006) (allowing accident reconstruction expert to testify on basic elements of crash, but barring testimony regarding "'phantom acceleration' from a defective speed control system, or any opinion testimony as to specific design defects of the 1998 Ford Explorer"); *Melberg v. Plains Mktg., L.P.*, 332 F. Supp. 2d 1253, 1257 (D.N.D. 2004) (considering challenge to expert's calculation of impact speed based on *Daubert* and *Kumho Tire*); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 731, 748 (W.D. Va. 2004) (allowing expert opinion on speed of vehicle at impact, "provided that the data from the restraints control module on the test and accident vehicles is substantially similar").

69. *Ferrell*, 484 P.2d at 268.

70. The Federal Rules of Evidence were largely adopted by the Alaska Supreme Court acting in its administrative capacity, pursuant to Supreme Court Order 364 effective August 1, 1979.

71. 432 P.2d 607 (Alaska 1967).

proffered expert on a motorcycle's stopping ability relative to a car.⁷² The expert's testimony was elicited to show that the defendant, as an inexperienced motorcycle driver, should have been going slower to begin with because he would not have been able to stop quickly enough at his speed.⁷³ The court noted that the witness "presented no uniform charts and admitted he had never conducted experiments on stopping characteristics."⁷⁴ The trial court also found that testimony about a motorcycle's comparative stopping ability had little relevance to the facts at issue: there was no testimony that appellee saw or could have seen the vehicle before the accident, and "appellee's un rebutted testimony was that 'there was just barely enough time to even reach for the brakes.'"⁷⁵ In modern parlance, there was no "fit" between the methodology and the issues in contention.⁷⁶

Thus, the irony of the current state of confusion is that none of it is necessary. The Alaska Supreme Court crafted a sensible procedure for reviewing the methodology of proffered expert testimony long before the national controversy arrived in Alaska's courts. Under these precedents, which have never been overruled, trial courts should indeed be permitted to act as gatekeepers that guard juries against experts with nothing of substance to offer. The precise terminology or factors used to describe this process is not important. Neither is the particular modern evidence rule cited in authority. What is important is that trial courts be reassured that they have the authority to take a hard look at proffered opinions and to block them, or even to exclude all experts if they will do more harm than good to the fact-finding process.

C. Qualification of the Expert to Testify Versus Qualification of the Expert as an Expert

Although the precise terminology used is not the critical part, it can give rise to confusion, particularly regarding an expert's "qualification." This is an ambiguous concept. In most recent cases, an expert's "qualification" is nothing more than the evidentiary foundation

72. *Id.* at 612.

73. *Id.*

74. *Id.*

75. *Id.*

76. *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) ("[T]here is no fit where a large analytical leap must be made between the facts and the opinion.") (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (offering animal studies showing one type of cancer in mice to establish causation of another type of cancer in humans is "simply too great an analytical gap between the data and the opinion offered").

(sometimes established at a brief bench hearing) of his underlying personal expertise.⁷⁷ However, the Alaska courts' use of an expanded "qualification" in these older cases makes some sense, even if it is confusing. After all, nobody is "qualified" to offer an *ipse dixit* opinion unless the witness in question is coming down from a fiery mountain with a brace of stone tablets.⁷⁸ In this sense, however, the "qualification" analysis is looking at the expert's methodology, not just his curriculum vitae. As the case law has developed, consideration of "qualification" has been relegated to a purely foundational, threshold analysis with little, if any, attention paid to the opinion or underlying methodology. Rather, the court's focus is on the training and background of the expert himself.⁷⁹

Under Alaska law, the baseline test for personal qualification as an expert witness is whether the witness "has the requisite intelligence and reasonable contact with the subject matter to allow him to demonstrate his expertise with reasonable skill."⁸⁰ There is no requirement that the witness devote full time to the specialty.⁸¹ There is also no requirement that the witness have any advanced education, or indeed any formal education at all.⁸² Such decisions regarding an expert's personal qualification are left to the sound discretion of the trial courts.⁸³

Yet the question of an expert's basic, personal qualification as an expert is separate and distinct from the question of whether the proffered opinion is helpful or based on some reliable methodology. It is therefore possible for a fully qualified expert to offer an opinion devoid of any utility for the trier of fact. One of the classic types of opinions rejected by courts under the Federal Rules of Evidence is the so-called

77. See *id.* at 1296-98.

78. *Navarro v. Fuji Heavy Indus.*, 117 F.3d 1027, 1031 (7th Cir. 1997) ("[A] conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence.") (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993)).

79. See, e.g., *Doisher v. State*, 632 P.2d 242, 256-57 (Alaska Ct. App. 1981) (upholding trial court's decision to allow fingerprint analyst with training in tool marks to testify as to tool marks).

80. *Lewis v. State*, 469 P.2d 689, 693-94 (Alaska 1970).

81. *State v. Phillips*, 470 P.2d 266, 270 (Alaska 1970) (citing *Lewis*, 469 P.2d at 693).

82. See, e.g., *Barrett v. Era Aviation, Inc.*, 996 P.2d 101, 103 (Alaska 2000) (reversing trial court's exclusion of pilot testifying as to mechanical question where apparent basis was lack of formal licensing).

83. See *Pedersen v. State*, 420 P.2d 327, 335 (Alaska 1966) ("[T]he decision in regard to the requisite qualifications of an expert witness is left to the trial court's discretion and is reviewable only for abuse."); see also *City of Fairbanks v. Nesbett*, 432 P.2d 607, 611-12 (Alaska 1967); *Crawford v. Rogers*, 406 P.2d 189, 192-93 (Alaska 1965).

ipse dixit opinion.⁸⁴ Such an opinion is propped up solely by the expert's impressive qualifications. The expert announces, in effect, that the opinion is so because he says it is so.

In spite of the fact that the federal standard and the state standard do not really stand at odds, the clash of terminology has made the standard's application today extraordinarily confusing. For example, in *Barrett v. Era Aviation, Inc.*,⁸⁵ a passenger sued the airline for alleged barotrauma arising from pressure variations he claimed to have experienced on a shuttle to the North Slope.⁸⁶ The plaintiff sought to introduce testimony from an airplane pilot, John Spencer, regarding alleged negligence in maintaining the Convair's pressurization system.⁸⁷ The trial court precluded his testimony in part, preventing him from testifying about the standard of care for aircraft maintenance or opining on Era's negligence.⁸⁸ Although the Alaska Supreme Court affirmed the trial court because of a split decision, it reasoned that Spencer had satisfied the minimal "qualifications" for testifying as an expert even if he was not licensed as a mechanic, since "as a pilot, Spencer is required to possess significant knowledge about the proper maintenance of the planes he flies."⁸⁹ The supreme court held that a trial court is expected to balance "the value of the evidence against the danger of undue prejudice, distraction of the jury from the issues, and waste of time" when ruling on whether to exclude an expert based on qualifications.⁹⁰

The *Barrett* court cited *Lewis v. State*⁹¹ for this odd proposition, but *Lewis* simply held that the trier of fact should be permitted to hear qualified expert testimony where the jury "would have benefited" from the proffered testimony.⁹² In fact, the text quoted from *Lewis* comes from a *different* portion of the *Lewis* opinion that addresses the question of whether the court felt the proffered expert testimony was unfairly prejudicial.⁹³ This is often referred to as a Rule 403 analysis.⁹⁴ It has no

84. See *supra* notes 24–26 and accompanying text.

85. 996 P.2d 101 (Alaska 2000).

86. *Id.* at 102.

87. *Id.*

88. *Id.*

89. *Id.* at 103–04.

90. *Id.* (quoting *Lewis v. State*, 469 P.2d 689, 695–96 (Alaska 1970)).

91. 469 P.2d 689 (Alaska 1970).

92. *Id.* at 694–95.

93. *Id.* at 696 ("The trial judge may have felt that the testimony . . . would have been unduly prejudicial against the state. We have previously stated that in determining whether to admit or exclude demonstrative evidence, the trial judge must balance the value of evidence against the danger of undue prejudice, distraction of the jury from the issues, and waste of time." (citing *Love v. State*, 457 P.2d 622 (Alaska 1969))).

94. ALASKA R. EVID. 403.

direct bearing on the question of expert admission, except to the extent that the expert's opinion or his demonstrative aids create some special threat of unfair prejudice. Moreover, the trial court's ruling in the *Barrett* case is fully in keeping with earlier Alaska cases, where trial courts were permitted to keep experts from straying too far beyond the bounds of their knowledge or their ability in a particular case.⁹⁵

The *Barrett* court's confusion on this point arises from the confounding nature of the "qualification" analysis. The trial court examined more than Spencer's resume, looking to the opinions he was proffering and what methods he used to support it. Given the precedent already examined, the trial court should have been able to do this, even though this inquiry technically goes beyond "qualification" into a review of methodology and fitness. The cure for this problem is simple. Courts should clarify the distinction between threshold questions of expert qualification and more detailed questions regarding the reliability of expert opinions.

III. THE FEDERAL STANDARD IN ALASKA: ACCEPTING DAUBERT BUT REJECTING KUMHO TIRE

The relationship between Alaska and the federal standard has been a complicated one. First, the Alaska Supreme Court accepted *Daubert* and applied its more rigorous gatekeeping standard to scientific experts.⁹⁶ However, the court later rejected *Kumho Tire* and, in the process, adopted a standard that leaves the trial courts with little gatekeeping authority regarding non-scientific experts.⁹⁷ This approach has the distinct disadvantage of both placing Alaska courts in the precarious terrain in which the federal courts found themselves before *Kumho Tire* and also making it easier for unqualified hired guns to qualify as experts. What is most distressing about this situation is that, as argued above, Alaska had already laid the groundwork for an effective and distinctly Alaskan approach to expert testimony even before the drafting of the Federal Rules.

95. See *Barrett*, 996 P.2d at 102; accord *Pedersen v. State*, 420 P.2d 327, 335 (Alaska 1966); *City of Fairbanks v. Nesbett*, 432 P.2d 607, 611-12 (Alaska 1967).

96. See *State v. Coon*, 974 P.2d 386, 395 (Alaska 1999); see also *infra* Part III.A.

97. See *Marron v. Stromstad*, 123 P.3d 992, 1005-06 (Alaska 2005); see also *infra* Part III.B.

A. *Frye* and *Daubert* Battle in Alaska

From the broad questions of expert admissibility, we move to the much narrower question of the in-court use of novel scientific methods or theories. Testimony arising from hypnotherapy has long been a controversial subject in United States courts. The issue came to a head in Alaska with the *State v. Contreras*⁹⁸ decision, where the purported victims of crime had their memories refreshed via hypnosis prior to identifying the defendant.⁹⁹ The defendants argued that there would be no way for the witness or any expert to be sure what part of the post-hypnosis testimony was real and what part was the product of suggestion or confabulation and that the witness would be prone to false confidence in the revived memories.¹⁰⁰ The lower courts came to opposite conclusions on the question.¹⁰¹ The Alaska Supreme Court took review of the decision and held as a matter of law that a witness who has been previously hypnotized may “testify only to facts which he related prior to hypnosis.”¹⁰² The court considered “a variety of empirical and theoretical works” regarding the definition and reliability of hypnosis and concluded that “it is apparent that suggestibility poses a fundamental problem with admitting hypnotically induced statements or recollections.”¹⁰³

Over a decade later, the Alaska Supreme Court revisited the question in *State v. Coon*.¹⁰⁴ In *Coon*, the defendant was charged with terroristic threatening for leaving voicemail messages.¹⁰⁵ The State proffered the testimony of a voice analysis expert “who compared the voice on the answering machine with verbatim voice exemplars provided by Coon.”¹⁰⁶ The trial court allowed the testimony.¹⁰⁷ The court of appeals reversed, holding that the State had failed to establish,

98. 674 P.2d 792 (Alaska Ct. App. 1983).

99. *Id.* at 794–95. The *Contreras* appeal actually involved two cases where the trial courts had come to conflicting decisions. *Id.*

100. *Id.* at 795–96.

101. *Id.* at 794–95. Judge Serdahely ruled that the witness “could not testify at trial regarding any matter discussed by her with the hypnotist during the hypnotic session.” *Id.* at 794. Judge Buckalew ruled that any undue influence of the hypnosis was “a matter affecting [the witness’s] credibility to be determined by the jury and not a matter of competency to be determined by the court.” *Id.* at 794–95.

102. *Contreras v. State*, 718 P.2d 129, 130 (Alaska 1986).

103. *Id.* at 131 (footnote omitted).

104. 974 P.2d 386, 388 (Alaska 1999).

105. *Id.*

106. *Id.*

107. *Id.*

pursuant to *Frye*, that the scientific community “generally accepted voice spectrographic analysis.”¹⁰⁸

The supreme court reversed, rejected *Frye*, and seemingly adopted the federal standard for admission of expert testimony.¹⁰⁹ The *Coon* court first examined the Alaska Rules of Evidence, noting that under Rule 104(a) of the Alaska Rules of Evidence the trial court has a “duty to determine preliminary questions concerning the qualification of a person to be a witness and the admissibility of evidence.”¹¹⁰ The court noted that relevant evidence was generally admissible unless barred by Rule 403 of the Alaska Rules of Evidence, and that under Rule 702, experts were allowed to offer “helpful opinion testimony” that, under Rule 703, can be based on “facts or data of a type reasonably relied upon by experts in the field.”¹¹¹ The court held that:

[E]xpert opinion evidence is admissible if the trial court (exercising its authority under Rule 104(a)) determines that (1) the evidence is relevant (Rule 401); (2) the witness is qualified as an expert (Rule 702(a)); (3) the trier of fact will be assisted (Rule 702(a)); (4) the facts or data on which the opinion is based are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject (Rule 703); and (5) the probative value of the evidence is not outweighed by its prejudicial effect (Rule 403).¹¹²

Furthermore:

Our evidence rules give trial courts both the authority and the responsibility to determine the admissibility of such evidence without being limited to the general acceptance standard. They preclude this inquiry from focusing exclusively on general acceptance or any other single factor. Our evidence rules contemplate a broader inquiry, allowing a proponent to establish admissibility even if general acceptance is absent, and allowing an opponent to challenge admissibility even if general acceptance is present.¹¹³

Thus, for scientific experts offering a novel theory, the court held that trial courts would be permitted to subject an expert’s theory to a

108. *Id.*

109. *Id.* at 395 (holding *Daubert* the standard for admission of expert testimony).

110. *Id.* at 392–93.

111. *Id.* at 393 (footnotes omitted) (citing ALASKA R. EVID. 702).

112. *Id.* (footnote omitted).

113. *Id.*

Daubert inquiry rather than being limited to testing for general acceptance.¹¹⁴ At the same time, the court said nothing definite in *Coon* about how or even if trial courts would be permitted to scrutinize a non-scientific expert's testimony. That question was answered for the federal courts in *Kumho Tire* shortly after *Coon* was handed down.¹¹⁵ For several years there was an open question as to whether Alaska courts would adopt this broadened application of *Daubert*.¹¹⁶ At the same time, there was a growing confusion over exactly what discretion trial courts had in scrutinizing proffered testimony.¹¹⁷

B. *Marron v. Stromstad* Rejects *Kumho Tire* and Repudiates Gatekeeping

After adopting *Daubert* in *Coon*, the Alaska Supreme Court strangely rejected *Kumho Tire's* expansion of the federal standard in *Marron v. Stromstad*.¹¹⁸ In that case, the court considered whether a treating physician proffering expert testimony as to the potential for future treatment should be subject to a *Coon* reliability analysis.¹¹⁹ As to the physician, the court decided that "when a treating physician testifies regarding a course of treatment, the physician's testimony need not be subjected to a *Daubert* analysis."¹²⁰ The *Marron* court considered and expressly rejected the approach taken by the Supreme Court in *Kumho Tire*.¹²¹ The court limited *Coon* "to expert testimony based on scientific theory, as opposed to testimony based upon the expert's personal experience."¹²²

The supreme court further rejected an effort to apply the *Coon* analysis to reconstruction expert Jim Stirling.¹²³ The court noted that Stirling satisfied the "liberal admissibility standard" for expert

114. *Id.*

115. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 146-49 (1999).

116. See *Ratliff v. State*, 110 P.3d 982, 985 (Alaska Ct. App. 2005) (noting that the Alaska Supreme Court had not yet adopted *Kumho Tire*); *Vent v. State*, 67 P.3d 661, 669-70 (Alaska Ct. App. 2003) (applying *Kumho Tire*); *Bourdon v. State*, Nos. A-7689, A-7699, 2002 WL 31761482, at *7 (Alaska Ct. App. Dec. 11, 2002) ("Neither this court nor the Alaska Supreme Court has ruled on the admissibility of a child abuse expert's testimony after *Daubert* and *Coon*.").

117. See *supra* Part II.C.

118. 123 P.3d 992 (Alaska 2005).

119. *Id.* at 1001.

120. *Id.* at 1002.

121. *Id.* at 1004.

122. *Id.*

123. *Id.* at 1003.

witnesses.¹²⁴ That standard, as now expressed, “allows any person with specialized knowledge to serve as an expert witness, so long as that knowledge is relevant, in that it can help the trier of fact understand evidence or determine facts in issue.”¹²⁵ What is notably missing is approval of *any* gatekeeping role beyond the bare rubber stamping of threshold relevancy and some level of qualification. Likewise, the court rejected any reliability analysis for the expert Dr. Rubenstein. The court acknowledged that “the superior court admitted the testimony of Stirling and Dr. Rubenstein based on the reliability of their expertise in general, rather than its application in this particular case.”¹²⁶ The court endorsed this analysis,¹²⁷ implying strongly that trial courts should no longer examine the application of expertise to any particular case. The new holding threatened to overturn earlier Alaska Supreme Court opinions that rejected experts for gaps between experience and opinion or for lack of reliable methodology. Fortunately, the *Marron* court did not overtly address this discrepancy, and some hope remains that trial courts will be given back the latitude they once enjoyed to make basic reliability and fitness determinations of all proffered experts.

C. The Mess *Marron* Has Made

The *Marron* court’s rejection of *Kumho Tire* and admonishment against excluding any non-scientific experts has left Alaska trial courts in a difficult position. The new rule appears not only to limit the formal *Daubert* factors to hard science, but also to limit the trial court’s role to a merely rubber stamping a baseline level of qualification. This approach has led to serious practical problems and rests on questionable logic.

First, the practical impact of *Marron* has been strong. For example, in *Marsingill v. O’Malley*,¹²⁸ the court rejected an attempt to apply the reliability analysis of *Coon* to expert physicians testifying as to the appropriate level of care.¹²⁹ The court reasoned that:

Dr. O’Malley’s experts possessed the relevant personal experience. Each had extensive experience with patients and was routinely called upon to respond to patients’ questions

124. *Id.* at 1002 (quoting *John’s Heating Serv. v. Lamb*, 46 P.3d 1024, 1034 (Alaska 2002)).

125. *Id.*

126. *Id.* at 1004.

127. *Id.* at 1004–08. The supreme court did not explain how to analyze the reliability of expertise in general, other than by verifying the existence of a CV and minimal credentials.

128. 128 P.3d 151 (Alaska 2006).

129. *Id.* at 160.

during late night telephone calls. In addition, Dr. Braddock had completed several studies on the amount of information that doctors give patients in a variety of circumstances. As the trial court correctly observed, “an understanding of what a patient needs to know . . . and understanding what a doctor needs to say, is . . . related to what doctors do.” We have consistently recognized that experience-based expert testimony is admissible when the expert witness has substantial experience in the relevant field and the testimony might help the jury.¹³⁰

This sweeps very broadly indeed. The *Marsingill* court appears to be holding that the opinions of non-scientific experts should not undergo any reliability scrutiny. The trial court is essentially given a two-part checklist: if the witness has experience or other qualification, and if his proffered testimony has any theoretical applicability to a matter in contention, then it must be admitted. No further analysis is permitted unless the proffered testimony involves a novel scientific theory.

Though this approach furthers the Alaska Supreme Court’s policy of liberally admitting expert testimony, it also opens the door to abuse. Parties can ensure that their experts avoid any serious scrutiny by classifying the experts’ testimonies as experience-based rather than scientific. Experts are free to announce whatever conclusions they need to provide in order to support the side they wish to see victorious. Though cross-examination can provide some safeguards against this sort of abuse, the inquiry at that stage is obviously restricted by the rules of admissibility and any other limitations on permissible lines of questioning. A court in a pretrial hearing can make free inquiry into the expert’s methodology without fear of prejudicing the jury or opening the door to otherwise impermissible evidence. Furthermore, reliance on a jury with little background on the case to determine who is a real expert and who is a charlatan abdicates the court’s role as gatekeeper.

The current regime in Alaska is similar to the world-turned-upside-down the federal courts grappled with in the period between *Daubert* and *Kumho Tire*. Those experts who offer experience-based testimony are essentially given a free pass, while those who go to the trouble of applying some level of scientific rigor are held to a much higher standard. Moreover, even if *Coon’s* adoption of *Daubert* were complete, and not merely a limited adoption solely to liberalize the standard, this would not end the problem. A whole line of federal decisions evolved

130. *Id.* (citation omitted).

during that misty period devoted to resolving the alchemical distinction between “scientific testimony” and other types of testimony.¹³¹

In addition to the practical problems in its wake, the *Marron* court’s reasoning may well be called into question. The court cited criticism of *Kumho Tire*, but on closer examination some of this seems to be misplaced. For example, the *Logerquist v. McVey*¹³² decision was cited with approval in *Marron*.¹³³ Contrary to the *Marron* court’s insinuation, however, the Arizona court in *Logerquist* both retained *Frye* and rejected *Daubert*.¹³⁴ Moreover, the *Logerquist* opinion has been met with considerable criticism and confusion.¹³⁵ The court also relied on the Montana opinion, *Gilkey v. Schweitzer*.¹³⁶ Montana’s approach has created considerable confusion about what standard the Montana courts are applying.¹³⁷

Furthermore, there is a real question as to whether a rejection of *Kumho Tire* was even needed in order to uphold the trial court. As Chief Justice Bryner noted in his concurring opinion: “In my view, the superior court’s evidentiary rulings can easily be sustained as correct

131. See, e.g., Richard T. Stilwell, *Monitoring the Opinions of Biochemists and Beekeepers: The Application of Daubert & Robinson to Engineering Witnesses in Texas*, 51 BAYLOR L. REV. 95, 101 (1999); Gerald J. Todaro, *The Admissibility of Medical Testimony in Ohio: Daubert, Joiner and Ohio’s Relevance-Reliability Standard*, 46 CLEV. ST. L. REV. 319 (1998); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 951–55 (1995–96).

132. 1 P.3d 113 (Ariz. 2000).

133. *Marron v. Stromstad*, 123 P.3d 992, 1006 (Alaska 2005) (“Expanding *Daubert*’s scope to include all expert testimony seriously exacerbates these problems. Several states have agreed, and have declined to adopt the expansion of *Daubert* that *Kumho Tire* accomplished.”) (footnote omitted).

134. *Logerquist*, 1 P.3d at 125–30.

135. See, e.g., Edward J. Imwinkelried, *Logerquist v. McVey: The Majority’s Flawed Procedural Assumptions*, 33 ARIZ. ST. L.J. 121, 136 (2001) (“[I]t would be a grave mistake to construe Rule 104(a) as requiring the trial judge to unquestioningly accept facially sufficient foundational testimony.”); David L. Faigman, *Embracing the Darkness: Logerquist v. McVey and the Doctrine of Ignorance of Science Is an Excuse*, 33 ARIZ. ST. L.J. 87, 89 (2001) (“*Logerquist* appears to be mainly an aberration. It is a dead-end detour along the path to scientific competence among judges and lawyers.”); Crane McClennen, *Frye, Daubert, and Logerquist: Is Arizona Moving Ahead or Going in Circles?*, 34 ARIZ. ST. L.J. 571, 584 (2002).

136. 983 P.2d 869 (Mont. 1999).

137. See, e.g., *State v. Clifford*, 121 P.3d 489, 500–01 (Mont. 2005) (Nelson, J., concurring) (“[W]e have, since, essentially done away with the *Daubert* standards by limiting the requirements of that case and the courts’ gatekeeping obligation to proffered expert testimony of “novel” scientific evidence only. In doing so, we have committed an error of logic.”) (citations omitted); Robert L. Sterup, *Into the Twilight Zone: Admissibility of Scientific Expert Testimony in Montana after Daubert*, 58 MONT. L. REV. 465, 485–86 (1997).

applications of *Daubert* and *Kumho*. The opinion's categorical refusal to extend these cases to experience-based expert testimony is unnecessary, overbroad, and unsound."¹³⁸ As Justice Bryner correctly noted, there was no indication that the trial court's reasoning would be rejected by a federal court under *Kumho Tire*.¹³⁹ One of the main thrusts of that opinion was that the *Daubert* factors may or may not be applicable and that the trial courts should exercise their own discretion on what factors to apply.

Of course, there is an argument that allowing more expert testimony into court is a good thing because it allows both sides to present their best cases to the jury with minimal interference from the court. Alaska has a long tradition of respecting the wisdom of juries, particularly when any factual issues are in question. Perhaps more than federal courts, Alaska's civil system keeps the jury at the center of civil litigation. The Alaska Supreme Court is apparently concerned that if the full federal standard were adopted, Alaska trial courts will become austere and rigid, keeping each side from having its say and interfering too much in the weighing of evidence.¹⁴⁰ Even assuming Alaska's trial courts would go down that road, a better solution would be fleshing out the limits of the gatekeeping process—not abolishing the gatekeeping process altogether.

IV. BACK TO THE FUTURE

Casting Alaska trial courts into these murky realms is not in keeping with the long tradition of common sense and broad discretion in this state. The courts are busy enough without having to study the convoluted mass of federal case law in an attempt to distinguish who is a "scientific" expert. There is a strong tendency to simply let anyone with a degree or sufficient experience into court with the hope that the adversarial process will sort out any problems. The introduction of experts is no longer a court-controlled process, but a party-controlled process. Yet, at the same time, these witnesses are still granted enormous testimonial privileges that no mere fact witness can claim. They can fill in critical evidentiary gaps on causation for a plaintiff. They are also given ostensible approval as "experts." By allowing the parties to take total control of the process and leaving any criticism of the methodology or reliability to be hashed out on cross examination, the

138. *Marron*, 123 P.3d at 1014 (Bryner, C.J., concurring).

139. *Id.* (Bryner, C.J., concurring).

140. *See id.* at 1005-06.

current system has essentially abandoned the proverbial gate which Alaska courts long guarded.

The Alaska Supreme Court should revisit the broad rejection of *Kumho Tire* in *Marron* and ask whether either opinion was really necessary. The groundwork for a distinctly Alaskan approach was actually put in place decades before any of these opinions, and the best guidance for trial courts may well be a return to that common-sense, discretionary standard. This is actually in keeping with the discretionary standard the Supreme Court endorsed in *Kumho Tire*.

The Alaska courts should remember the importance of the central question—is this expert offering anything to the jury? For it is the jury the expert must help, not merely the interest of one party or the other. If the proffered testimony is nothing more than an unsupported opinion or agreement-for-hire garnished with the imprimatur of “expert,” then it will not be helpful to the trier of fact. Indeed, it stands a good chance of confusing them and unfairly prejudicing the case.

Turning to some of the seminal cases that came down after statehood, we find surprising insight that may help guide future determinations. While the language used in these earlier opinions did not include any of the modern *Daubert* and *Kumho Tire* jargon, a careful reading shows that trial courts of the time were in fact performing as gatekeepers. They were entertaining not just foundational questions of qualification but were conducting very detailed oversight. The courts were not afraid to preclude testimony if an expert’s reach exceeded his grasp. There was no federal authority in play then, of course, since Alaska had not adopted the Federal Rules. But the courts in Alaska came to pretty much the same conclusion by 1961 that the United States Supreme Court came to in 1999. The Alaska Supreme Court saw it as entirely appropriate for trial courts to scrutinize both the expert’s expertise and his proffered testimony. It was only in more recent times, with the confusing acceptance/rejection of the federal standard, that the role of trial courts has become confused. *Oxenberg*, *Ferrell*, and other decisions should be looked to as authority today. They are, after all, still good case law, and the basic premise underlying their approach is sound.

Under this approach, trial courts would be permitted broad discretion when considering the qualifications of the expert and whether his proffered testimony ought to be admitted. This discretion would expressly not require any particular formal hearings or rules but could be applied as and when needed, provided the court had an opportunity to hear from both sides. Requiring the court to hold a formal hearing, as some cases have suggested, would undercut the discretion and make simple issues far more complicated. For example, if a challenged expert

can, after reasonable opportunity, offer no methodology of any kind for his conclusion, the trial court ought to have discretion to exclude that expert without undergoing an extensive pretrial voir dire. Trial courts used to have that authority in Alaska, but it appears to have been pulled away for no good reason.

Trial courts would also be free to engage in a flexible, common-sense reliability review of methodology for all experts. It is clear that the Alaska Supreme Court has been very reluctant to follow the more aggressive federal opinions regarding expert testimony and is very reluctant to allow a judge to substitute his opinion for that of the jury. However, the choice between an activist federal approach and limiting review to bare qualifications is a false choice. The middle ground has already been discovered by our forebears and needs only be revived and fleshed out. A trial court should be free to take a basic look at how the experts came to their conclusions. This need not and should not involve a second-guessing or credibility analysis. But if, for example, an expert wants to testify as to the cause of an auto crash, he should be able to explain to the court's satisfaction how he used his expertise to come to that conclusion. If he did nothing more than put some new names in a pattern report and sign off on it, then he should not be permitted to offer that opinion. He should be able to "show his work" to the court. With this discretion in place, the need for the formal rules of *Frye* or *Daubert* is thrown into question. These may or may not be utilized as the trial court sees fit, but in most cases they would not be needed and should not be required.

Trial courts should also be free to ask the elemental question—is it needed? This question, among the most basic of all questions dealing with the admission of expert testimony, has largely been overlooked in the debate. As Justice Dimond noted in *Oxenber*, however, if the jury doesn't need experts, then experts should not be admitted. That little kernel of wisdom would go a long way towards ensuring that basic traffic cases and routine criminal matters not get bogged down with costly expert arms races or battles.

At the same time, in keeping with the longstanding tradition of liberal admission of relevant testimony in Alaska, the goal is not and must not be substitution of the trial court's opinion for the expert's. Nor should the fact that the expert's peers disagree with him be grounds for exclusion. Rejection of *Frye* has helped to cement these principles. Yet the gate at the threshold should not be left open. Bare-bones qualification regarding an area of expertise should not be all that is required.

To this end, the Alaska Supreme Court should return to the common-sense approach adopted in the state long before *Daubert* or

Kumho Tire. The name put on this process is not important. Rather, the process must allow trial courts to be free to block from the witness stand those offering pronouncements without support, even if their credentials are fine. The sweeping admonitions of *Marron* and other recent opinions which appear to forbid any gatekeeping beyond a rubber-stamping of bare qualification should be retracted or clarified. Gatekeeping is an important aspect of the court's discretion, and it is imperative that trial courts be given this authority once again. As far as concerns about access to the judicial system and judges taking the place of juries by excluding experts, these issues arose outside Alaska and have limited application to this state.¹⁴¹ One is reminded of Shane's admonishment, that "a gun is a tool . . . as good or as bad as the man using it."¹⁴² The discretionary procedures for vetting experts are also tools, no better or worse than the court using them. Like any powerful tool they can be subject to abuse in the wrong hands, but this is not a concern that should stay the hand of the Alaska court system.

CONCLUSION

Experts are not like other witnesses. They can offer conclusions and discuss factual details of a case even though they have no firsthand knowledge of events and would otherwise be excluded as incompetent. Likewise, hybrid fact/expert witnesses, such as treating physicians, have enormous power to sway a case one way or the other. The court system's own rules of evidence make this testimony possible, and the courts bear the responsibility of making sure this broad leeway is not abused. The adversarial process itself offers strong protections against charlatans and mere hired guns, but it is too constrained in open court to be the exclusive safeguard. The court itself must make an initial determination of fit and reliability whenever expert testimony is proffered. Moreover, the court should be permitted to question whether experts are needed at all, or if the jury can be trusted to come to its own conclusions. This process does not interfere with the adversarial process or with the jury's role; instead, it ensures that the court-issued imprimatur does not become an open-ended license. The approach taken by early decisions in Alaska should serve as the foundation for establishing a new, common-sense approach that is not beholden to the latest federal trends.

141. See, e.g., *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

142. *SHANE* (Paramount Pictures 1953).