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EXPERT TESTIMONY AND THE RELEVANCY RULE IN THE AGE OF *DAUBERT*

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I. INTRODUCTION

Wisconsin has been in the forefront of many important innovations throughout its legal history.¹ The innovations have fostered distinct legal doctrine in various areas that in turn have been both praised and criticized, as is to be expected.²

This Article explores Wisconsin's unique approach to the admissibility of expert testimony, a seemingly mundane, technical issue yet one of central importance to the judicial system. Nearly every civil case of consequence, and many criminal cases, relies on expert testimony.³ The cost and complexity of expert evidence often drives decisions by lawyers about whether to take a case in the first instance. And concerns about the admissibility of expert testimony may strongly influence decisions to settle a case prior to trial. Finally, it cannot be gainsaid that expert testimony may have a critical effect on the outcome of cases that are tried.

Wisconsin's uniqueness rests in its adherence to what is called the relevancy test for admitting expert evidence. Simply put, expert testimony is admissible if it is relevant, the witness is qualified based on his or her "specialized knowledge," and the testimony will assist the trier of fact in better understanding the evidence or determining a fact in issue. The reliability of the expert's reasoning, methodology, or tests are left to the trier of fact as matters of weight. Nearly all other jurisdictions impose more formidable thresholds for admissibility. The Federal Rules of Evidence mandate that the trial judge serve as a "gatekeeper" who must find that the expert's principles, methods, and tests, along with their application, are reliable according to prevailing standards in the field of expertise. Most states now follow some variant of the federal approach, although many still adhere to the common law standard, which asks whether the expert's methods were those "generally accepted" by the community of experts (the "*Frye*" standard).⁴

1. See generally JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM (1999).

2. See, e.g., Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723 (2006).

3. See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 67 (6th ed. 2006) ("In the past two decades, the use of expert witnesses has skyrocketed.").

4. Two of the most careful and widely recognized students of expert evidence have grouped the fifty states, the federal courts, and the military courts according to the various standards of expert admissibility. PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §§ 1.13–15 (3d ed. 1999 & Supp. 2005). For present purposes, there are three standards: (1) the *Daubert/Kumho Tire* reliability test, (2) the *Frye* "general acceptance" test, and (3) the relevancy test. All three are discussed more fully in this Article.

Wisconsin case law, as we will see, has explicitly rejected both the federal reliability standard and the general acceptance test; its relevancy standard thus represents a “third way” that falls well outside the mainstream of prevailing evidence doctrine. The distinction is welcome. Applying sophisticated quantitative methodologies, one recent study concluded that there is no “practical difference” between the *Frye* test and the reliability standard.⁵ If a uniform evidence rule is the goal, the authors argue, states should adopt the *Daubert* test and eschew “doctrinal differences in name only.”⁶ But if states are to play the role of “laboratories of legal process,” then meaningful “variation and experimentation should be embraced.”⁷

The relevancy test offers a substantively distinct alternative to the federal reliability rule that is built upon a vastly different set of assumptions, namely, a commitment to and confidence in the modern adversary trial. In contrast, the federal approach evinces a distinct distrust of the adversary trial and lay fact finding, despite protests to the contrary, and is more attuned to summary judgment adjudication than trial. Under the relevancy test, the strengths and weaknesses of an expert’s testimony are, one assumes, sufficiently exposed through cross-examination and impeachment before a trier of fact capable of sorting through the issues; it is unnecessary for trial judges to first screen the testimony for reliability, especially as judges may be no better equipped for the task than the lay jury. Thus, the relevancy test strives to assure fair adversary trials, not arbitrate scientific disputes. This said, federal developments have, however, affected Wisconsin’s relevancy approach,

See infra text accompanying notes 46–55 (*Daubert/Kumho Tire*), 30 (*Frye*), and 70–75 (the relevancy test). According to Giannelli and Imwinkelried, it appears that the military courts and thirty-one states follow the lead of the federal courts by applying a reliability test. *Id.* §§ 1.13–14. Sixteen states and the District of Columbia adhere to the *Frye* general acceptance test. Alabama employs both tests, depending on the nature of the scientific evidence. *See id.* §§ 1.13–15. Only Wisconsin and North Carolina appear to follow variations of the relevancy test. *See infra* note 74–76.

5. Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 511 (2005). More to the point, “the skirmishing between the champions of *Frye* and *Daubert* yields few benefits and creates more confusion than anything else.” *Id.* at 503–04.

6. *Id.* at 504.

7. *Id.* Cheng and Yoon’s “findings suggest that future attempts to improve the handling of scientific evidence in the courts could be more effective if advocates for rigorous use of scientific evidence shifted their focus away from tinkering with doctrinal tests and instead toward ‘softer’ solutions that increase the judiciary’s understanding of scientific concepts and processes.” *Id.*

transforming it in subtle, important ways that nonetheless reaffirm its faith in adjudication by trial.

The changes reflect a doctrinal dialogue, if you will, between the relevancy rule and the federal reliability standard, or more precisely, the proponents of each. While clearly and emphatically rejecting the federal standard and the *Frye* test, Wisconsin case law nonetheless recognizes the very real concerns about fringe experts and questionable practices. The result is an emerging body of law that has retuned the relevancy test in a way that provides trial judges with the means of limiting and excluding expert testimony where appropriate while remaining faithful to the assistance standard. Of particular importance are cases discussing the qualifications of experts and recognizing a “limited gatekeeping” function for trial judges.⁸ In no sense, however, has the test become some version of “*Daubert-lite*.”

The purpose of this Article is to analyze the subtle transformation of the relevancy test and to offer some suggestions for its application in civil litigation.⁹ Two broad questions inform the discussion. First, does Wisconsin law adequately address challenges presented by speculative or unfounded expert testimony? Second, does the case law manifest a need to change the rules, particularly in ways that risk distorting the role of the adversary trial and the jury in fact finding?

In addressing these questions, we will first examine the origins of the relevancy rule and its underlying rationale, which were firmly entrenched in Wisconsin case law when the Rules of Evidence were adopted in the mid-1970s. The prime rule on expert testimony, section 907.02 of the Wisconsin Statutes,¹⁰ furthers the relevancy test’s strong preference for providing assistance (specialized knowledge) whenever it might be helpful to the trier of fact. What to do with speculative or

8. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 24.04, at 321 (2d ed. 2006). Professor Giannelli concludes that the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has had perhaps the “most profound,” yet “least noticed,” effect on the relevancy test, where a “number of courts” that had rejected *Frye* (general acceptance) before *Daubert* “now claim that *Daubert* is consistent with their former approach.” *Id.* Giannelli concludes that this may be “true in some instances but not in others.” *Id.* Wisconsin’s rejection of both *Frye* and *Daubert* place it outside this class of cases as well.

9. There are several reasons for this focus. First, experts are used more frequently and on a wider range of issues in civil litigation than they are in criminal cases. Second, and more important, the constitution constrains prosecutors and enables defendants in the use of expert testimony over and above the demands of the evidentiary rules. See *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777. Our focus is on those evidence rules, not the still-developing constitutional doctrines.

10. WIS. STAT. § 907.02 (2003–2004).

uncertain expert testimony, however, remains an issue. The explicit rejection of both the general acceptance and the federal reliability standards rests on grounds that they are “alien” to Wisconsin law; experience had shown that lay juries could adequately weigh expert testimony and that reliability determinations may themselves be arbitrary.¹¹

Yet there are limits. Case law assigns Wisconsin judges a “limited gatekeeping” function. Part III explores the “authentication” of expert testimony, an as yet largely overlooked issue. Briefly stated, although Wisconsin cases hold that reliability goes to the weight of the evidence, the principle of authentication and the doctrine of conditional relevancy impose an important, although often ignored, threshold. The trial judge must first determine whether a reasonable jury could find the expert’s principles, methods, tests, or reasoning reliable.

Parts IV and V offer a comprehensive discussion of the limited gatekeeping function and its implications. Limited gatekeeping, which also embraces the authentication foundation, means more than weighing evidence under section 904.03’s balancing test, which is strongly tilted in favor of admissibility. Rather, section 907.02 carries its own discretionary, flexible assistance standard that allows judges to exclude, limit, or otherwise shape expert testimony when its probative value is offset by, or evenly balanced against, concerns that it is superfluous, a waste of time, or confusing.

Part VI discusses the relevancy test today, examining each of its core elements—relevancy, qualifications, and assistance. The Article contends that the relevancy test has been subtly reshaped and refocused in light of concerns about fringe experts, the debate over the federal reliability standard, and the recognition of a limited gatekeeping function. First, the threshold requirement that the expert’s testimony be “relevant”¹² has been used to exclude opinions and methodology that are speculative, uncertain, confusing, or otherwise completely unhelpful; in effect, the experts are speaking a language that cannot be usefully translated in the courtroom. It is recommended that in appropriate cases, particularly those raising questions about the reliability of an expert’s methods or test, the trial court should also consider the

11. If a choice is to be made between subjecting the expert’s methods to an “adversarial test” or a “scientific test,” Wisconsin law clearly favors the former. See GIANNELLI, *supra* note 8, § 24.10, at 333 (quoting *United States v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002) (depublished)).

12. WIS. STAT. § 904.02 (2003–2004).

authentication requirement of section 909.01(1) along with the threshold issue of relevancy under section 904.02. The second and third elements—qualifications and assistance—have been most dramatically affected by the limited gatekeeping function. An expert’s qualifications should be assessed on a question-by-question basis; so-called “field” findings are inappropriate. Qualifications themselves are an index of how much (if any) specialized knowledge the witness possesses, whether gained through formal education or experience. This approach is explored in discussions of two important cases, *Martindale v. Ripp*¹³ and *Green v. Smith & Nephew AHP, Inc.*¹⁴ The critical point is that qualifications largely determine the range of possible assistance an expert may provide. Indeed, the argument is that qualifications and assistance perform in tandem much like an algebraic function: qualifications (the domain) define the scope of possible assistance (the range). And it is the trial judge, using the limited gatekeeping authority, who has the discretion to choose the form and content of the expert’s testimony from among the range of possible assistance. Thus, the judge may restrict the expert to exposition (a lecture) on the specialized subject matter without reference to the facts of the case or otherwise limit the expert’s opinion testimony. In any event, the proper exercise of the trial judge’s discretion is immeasurably enhanced by the informed interplay of objections and offers of proof by trial counsel.

II. NEW RULES, OLD PROBLEMS: RELEVANCY, GENERAL ACCEPTANCE, AND RELIABILITY STANDARDS

Courts have anguished over the admissibility of expert testimony ever since the law of evidence took upon itself the task of regulating the formal use of proof at trial.¹⁵ Over the last fifty years, state and federal case law reflect three competing, shifting, and sometimes overlapping approaches: (1) the *Frye* or “general acceptance” standard; (2) the reliability standard now ensconced in Rule 702 of the Federal Rules of Evidence;¹⁶ and (3) the relevancy test.¹⁷ The focus in this Part is

13. 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698.

14. 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727.

15. See, e.g., Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901) (arguing that because of their “practical inconvenience,” partisan expert witnesses should be excluded in favor of an “advisory tribunal” of independent experts with the ultimate power to decide esoteric issues). See also TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA 4 (2004).

16. FED. R. EVID. 702.

Wisconsin's embrace of the relevancy test and the courts' reasons for rebuffing *Frye* and federal reliability standards.

In 1974, Wisconsin became one of the first states to adopt the then proposed Federal Rules of Evidence, even before their formal adoption by the federal judiciary.¹⁸ Although solidly rooted in the common law, the federal model included innovative rules on expert testimony that Wisconsin fully embraced.¹⁹ Section 907.02 of the Wisconsin Statutes, governing the admissibility of expert opinion testimony, provides:

907.02 Testimony by experts. 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.²⁰

It is identical to the original Rule 702 (since amended in 2000) and has remained unchanged since 1974.²¹

What was innovative about the rule? Many common law authorities had woodenly proclaimed that expert testimony should be permitted only when the subject was beyond the "ken of a lay jury,"²² that is, over the heads of persons of ordinary education and experience. The new rule rejected the common law's esoteric, often arbitrary approach in

17. See generally GIANNELLI, *supra* note 8, § 24.04, at 314.

18. Wisconsin adopted the proposed federal rules in June 1973; they became effective in January 1974. Sup. Ct. Order, 59 Wis. 2d R1 (1973) (promulgation of the Rules of Evidence for Wisconsin). For a history of the drafting, revision, and adoption of the Federal Rules of Evidence by the states, see CHARLES ALLAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §§ 5006–07 (Supp. 2005).

19. More precisely, Wisconsin adopted sections 702 through 705 of the Federal Rules of Evidence as proposed in the so-called Revised Draft. WRIGHT & GRAHAM, *supra* note 18, § 5007, at 112 n.7. At the same time, Wisconsin created section 907.07 of the Wisconsin Statutes, which permits experts to read their reports into evidence. Section 907.07 was based on Model Rule of Evidence 408. Sup. Ct. Order, 59 Wis. 2d at R219 (judicial council committee's note on the promulgation of section 907.07).

20. WIS. STAT. § 907.02 (2003–2004).

21. The federal version was amended in 2000 to conform to the *Daubert-Kumho Tire* doctrine. See *infra* text accompanying notes 46, 51.

22. GIANNELLI, *supra* note 8, § 24.03, at 308 n.8 (quoting *Jenkins v. United States*, 307 F.2d 637, 643 (D.C. Cir. 1962)).

favor of an “assist-the-jury” standard that welcomed experts’ specialized knowledge wherever it might “help” the jury better decide the case.²³

Yet for Wisconsin, the new rule represented vindication and clarification more than it did innovation. Decades earlier the Wisconsin Supreme Court embraced an assistance standard that reposed discretion in the trial judge to determine when an expert might help the jury better understand the issues:

The test or principal rule of admissibility of expert testimony is “whether the members of the jury having that knowledge and general experience common to every member of the community would be aided in a consideration of the issues by the testimony offered and received.”²⁴

23. *Id.* § 24.03, at 308. Giannelli observes that the common law’s “necessity” standard was not uniformly observed and that influential commentators, such as Dean Mason Ladd and John Henry Wigmore, favored more liberal “assistance” standards. *Id.*

24. *State v. Johnson*, 54 Wis. 2d 561, 564–65, 196 N.W.2d 717, 719 (1972) (quoting *Anderson v. Eggert*, 234 Wis. 348, 361, 291 N.W. 365 (1940)). *Johnson* upheld the admissibility of testimony by an “experienced” drug user that the pill he took was LSD, a controlled substance: “As an extensive user of a dangerous drug who experienced its effects over 100 times and who has seen its effect on other people, Bernstein had special knowledge of the drug and we think he would qualify to give his opinion.” *Id.* at 566, 196 N.W.2d at 720. *Johnson* in turn relied upon *Anderson v. Eggert*, 234 Wis. 348, 359, 291 N.W. 365, 370 (1940) (“In many courts it is held that the qualification of an expert, that is, whether by reason of special skill or knowledge he can be of assistance to the jury, is a matter wholly for the trial court.” (citing 1 WIGMORE EVIDENCE 963 (2d ed.)). *Anderson* upheld the trial judge’s decision to permit testimony by two University of Wisconsin physicists in a car accident case:

The expert witnesses in this case were not asked to state the laws of physics, but on the contrary were asked hypothetical questions based upon facts appearing in the evidence. They were asked to state, as a matter of expert knowledge, what would have happened to the Anderson car and the Eggert car if the conditions were as claimed by appellant as stated in the hypothetical question. They were also asked to answer a hypothetical question which embodied the facts as claimed by Eggert. In reaching their conclusion they applied their expert knowledge of the laws of physics. They were not asked, and they did not undertake to say, where the collision took place. *Whether the testimony was properly received in this case depends upon whether the members of the jury having that knowledge and general experience common to every member of the community would be aided in a consideration of the issues by the testimony offered and received.* That the expert witnesses had knowledge of the results of the application of force under varying circumstances not possessed by an ordinary person seems self-evident. While the witnesses may not have experimented with colliding automobiles, they were possessed of special knowledge of the laws of physics and the behavior of

Section 907.02 embodied this very same approach and thus portended no dramatic shift in doctrine or practice.²⁵ In short, trials need not be bogged down by questions about whether a subject is or is not within the purview of common sense and lay experience before permitting expert testimony. The goal is to educate the trier of fact, and if the jury already knows something about the subject, what harm comes from the added insight?²⁶

The assistance standard did not, however, address a second nettlesome and perhaps more intractable problem: How should courts distinguish proffered expert testimony that is speculative and uncertain from that which is truly of assistance?²⁷ Whatever its value in providing

bodies to which force is applied under given conditions. *Just as a lay person may not be able to make a proper diagnosis although all the symptoms are present and within his knowledge that are within the knowledge of the physician, so a person without special knowledge may not know how movable bodies will operate under a given set of circumstances.* It is considered that the trial court was not in error in permitting the expert witnesses to testify. Its instructions were well calculated to prevent the jury from attaching undue weight to the testimony of the experts.

234 Wis. at 360–61, 291 N.W.2d at 370–71 (emphasis added).

25. See WIS. STAT. § 907.02 (2003–2004) judicial council committee’s notes; see also Sup. Ct. Order, 59 Wis. 2d R1, R207 (1973) (citing cases, including *Johnson*, 54 Wis. 2d 561, 196 N.W.2d 717).

26. The Wisconsin Supreme Court clearly stated this policy in *State v. Watson*:

Under Wis. Stat. § 907.02, if a witness is qualified as an expert and has specialized knowledge that is relevant because it will assist the trier of fact to understand the evidence or determine a fact in issue, the expert’s analysis or opinion will normally be admitted into evidence. That a lay witness of ordinary intelligence may also understand the subject matter does not mean that the opinion of an expert in the field would not be of assistance to the trier of fact in understanding the evidence or determining a fact in issue. As a general rule, then, it is not an erroneous exercise of discretion for the court to admit expert testimony so long as the testimony aids the trier of fact in consideration of the issues.

227 Wis. 2d 167, 187, 595 N.W.2d 403, 412 (1999) (footnotes and citations omitted).

27. GIANNELLI, *supra* note 8, §§ 24.02, 24.04, at 307, 310. Giannelli, building on the insights of the great evidence scholar John M. Maguire, graphically depicts the subject matter of expert testimony in a chart that demarcates three distinct areas:

Speculative-Uncertain	Expert Testimony	Commonplace
A	B	

Id. § 24.02, at 307 (citing JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 30 (1947)).

expert assistance to juries, Rule 702, and therefore section 907.02, provided less direction on how to approach supposedly unreliable expert testimony. To be sure, many expert subjects posed little problem: opposing parties relying on similar experts might not raise any such challenge (e.g., medical doctors); statutes occasionally sanctioned a given technology (e.g., speed detection, DNA); and the court could always take judicial notice of a science or technology when appropriate.²⁸ Absent such opportunities, however, the parties had to authenticate the contested principle, method, or test. Yet the courts themselves disagreed over what standard applied.²⁹

By the mid-1980s, federal and state courts were constructing Rule 702 in very different ways. For example, the Seventh Circuit assumed that scientific evidence remained subject to the venerable common law *Frye* standard: is the theory, test, or technique generally accepted by the pertinent scientific community?³⁰ The Third Circuit cut its own path. Repudiating *Frye* and its “process of scientific ‘nose-counting,’” it broached a “flexible” reliability test that foreshadowed *Daubert* yet also emphasized the key features of the relevancy test.³¹ Many states that had adopted the federal model also continued to apply the *Frye* standard despite trenchant criticism that it was difficult to apply, excluded reliable testimony that had yet to win the mantle of general acceptance, and sometimes “obscure[d]” problems with a particular technique by preferring a “one-size-fits-all” approach.³²

Others contended that the federal rules, especially Rule 702, had displaced *Frye*’s general acceptance analysis with the relevancy test, a heterodox approach with a distinguished pedigree that included the first edition of McCormick’s great evidence treatise in the early 1950s. In essence, a qualified expert should be permitted to testify about relevant matters that might assist the jury; no further standards were needed. Its proponents argued that the relevancy test conformed to the sweeping definition of “relevant” evidence in Rule 401, the marked preference for

28. See DANIEL D. BLINKA, WISCONSIN EVIDENCE § 702.202 (2d ed. 2001) (collecting authority). Trial courts may take judicial notice based on section 902.01 (scientific facts that are beyond reasonable dispute) or legal precedent. GIANNELLI, *supra* note 8, § 24.04, at 311.

29. See GIANNELLI, *supra* note 8, § 24.04, at 311–12.

30. *United States v. Tranowski*, 659 F.2d 750, 756 (7th Cir. 1981) (discussing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). See also GIANNELLI, *supra* note 8, § 24.04[A], at 312–13; Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197 (1980).

31. *United States v. Downing*, 753 F.2d 1224, 1238–39 (3d Cir. 1985).

32. GIANNELLI, *supra* note 8, § 24.04[A], at 313.

admitting all relevant evidence established by Rule 401, and by Rule 702's generous assistance standard for experts generally.³³

When confronting this issue in the mid-1980s, the Wisconsin Supreme Court's decision in *State v. Walstad* reaffirmed its adherence to the relevancy approach based on decades-old case law, the text of the evidence rules, and policy grounds.³⁴ *Walstad* seemed a peculiar case for considering the admissibility of novel expert (scientific) testimony. There had been no trial and the broader issue on appeal concerned a defense motion to suppress because the police had destroyed allegedly exculpatory evidence, namely, chemical-filled ampoules used in testing the defendant's breath in a drunk driving investigation.³⁵ The trial judge heard expert testimony by each side and ruled that retesting the ampoules (the defendant's alleged goal) would yield nothing pertinent to the accuracy of the original breath test.³⁶ In so concluding, the trial judge stated that the "*Frye* test remains the accepted standard for admissibility of scientific testimony."³⁷ And in making this last assertion, the trial judge erred.

The *Walstad* court explicitly repudiated *Frye* as the threshold test for admitting expert evidence and used the occasion to elaborate upon the elements of, and policy underlying, the relevancy approach. First, the court confessed that its case law discussions "of *Frye* had not been marked by certainty or consistency," but now clarified that "[t]he *Frye* concept is alien to the Wisconsin law of evidence."³⁸ Although "general acceptance" might serve as a basis for judicial notice, contested expert testimony is admissible provided the witness is qualified, the issue is

33. See Giannelli, *supra* note 30, at 1232–45 (discussing the relevancy test in light of Federal Rules of Evidence 401–03 before the 2000 amendments). See also *id.* at 1203–04, 1229–30 (addressing the pre-*Daubert* uncertainty over whether the federal rules adopted the *Frye* standard or the relevancy standard). Writing in 1980, Giannelli skillfully explained how the federal rules conformed to the relevancy standard. In particular, Rule 402 declares that all relevant evidence shall be admitted unless excluded by other rules. FED. R. EVID. 402. Rule 401 expansively defines relevancy and Rule 403's balancing test assures that all relevant evidence is admissible unless substantially outweighed by other considerations. FED. R. EVID. 401, 403.

34. *State v. Walstad*, 119 Wis. 2d 483, 515–19, 351 N.W.2d 469, 485–87 (1984).

35. *Id.* at 485, 351 N.W.2d at 471.

36. *Id.* at 486, 351 N.W.2d at 471.

37. *Id.* at 515, 351 N.W.2d at 485 (quoting the record).

38. *Id.* at 515–16, 351 N.W.2d at 485–86. To illustrate the confused state of evidence law before *Walstad*, see Marvin C. Holz, *A Survey of Rules Governing Medical Proof in Wisconsin – 1970*, 1970 WIS. L. REV. 989, 1005–06 (1970), where one of Wisconsin's most skilled and learned trial judges concluded that the "general acceptance" standard governed the admissibility of expert medical testimony.

relevant, and the testimony will assist the trier of fact.³⁹ In emphasizing the trinity of relevance, qualifications, and assistance, *Walstad* relied on established precedent as well as the Judicial Council's commentary to section 907.02.⁴⁰ The court's confidence in the adversary trial, particularly cross-examination and impeachment, provided sufficient assurance that triers of fact (i.e., juries) would not give undue weight to flawed expertise:

The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.⁴¹

39. *Walstad*, 119 Wis. 2d at 516, 351 N.W.2d at 486. In rejecting *Frye*, the court also politely dismissed a "reliability" approach advocated by Paul Giannelli in his "excellent article," one that foreshadowed the reliability standard now embedded in Federal Rule of Evidence 702. *Id.* at 519 n.13, 351 N.W.2d at 487 n.13 (discussing Giannelli, *supra* note 30).

40. *Id.* at 518, 351 N.W.2d at 486-87 (discussing *Watson v. State*, 64 Wis. 2d 264, 219 N.W.2d 398 (1974)). The Judicial Council Committee's note to section 907.02 states:

Fear of encroachment upon the function of the trier of the fact prompted the negative view that the propriety of expert testimony was dependent upon the need of the trier of fact for enlightenment. More rational is an affirmative approach to the use of expert testimony predicated upon whether such testimony will assist the trier of the fact to understand the evidence or to determine a fact in issue. With such a test expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time.

Sup. Ct. Order, 59 Wis. 2d R1, R207 (1973).

41. *Walstad*, 119 Wis. 2d at 518-19, 351 N.W.2d at 487. The court quoted a Louisiana decision, *State v. Cantanese*, 363 So. 2d 975, 979 (La. 1979), that had adopted a rationale consistent with Wisconsin case law:

"The 'general acceptance' standard has been the subject of considerable scholarly criticism in recent years. In particular, it has been suggested that the requirement of 'general acceptance' is tantamount to a requirement that the validity of the test be susceptible of such demonstration as to enable the trial court to take judicial notice of the fact. Clearly, the criteria used for determining the admissibility of scientific evidence should not require the instant and unquestionable demonstration required for the judicial notice of scientific facts. Other types of scientific evidence have been admitted into evidence under less stringent standards which merely

Moreover, the trial judge may exclude expert testimony that is “superfluous or a waste of time.”⁴² In sum, the foundational elements of qualifications, relevancy, and assistance, combined with wide-open cross-examination and other rules of impeachment, provided the appropriate adversary safeguards. Just as it was unnecessary to erect a rigid barrier to guard the border between lay common sense and an expert’s specialized knowledge, the court also approved a permeable zone at the other end of this continuum where specialized knowledge shades into untested, uncertain theories, methods, and speculation.

The relevancy test, like the *Frye* standard, has always had its critics. A lay jury’s capability to understand and evaluate questionable assertions by experts lacks empirical support. Doubts also exist about whether the adversary trial provides a meaningful filter for unreliable expert testimony.⁴³ “The major flaw in the relevancy analysis,” observes Professor Paul Giannelli, “is its failure to recognize the distinctive problems of scientific evidence. In assessing probative value under this approach, the judge frequently is forced to defer to an expert, thereby permitting admissibility based on the views of a single individual in some cases.”⁴⁴ As the use of trial experts blossomed under Rule 702’s assistance standard, shrill declarations that “junk science” permeated courtrooms tended to drown out more nuanced concerns expressed by other critics.⁴⁵

require the evidence to be ‘an aid to the jury’ or ‘reliable enough to be probative’” This is the relevancy test of our rules and we adhere to it. It is clear, therefore, that the trial judge’s reliance upon *Frye* does not find support in the law of evidence of Wisconsin.

Walstad, 119 Wis. 2d. at 519, 351 N.W.2d at 487 (footnotes omitted).

42. *Walstad*, 119 Wis. 2d. at 516, 351 N.W.2d at 486.

43. See Giannelli, *supra* note 30, at 1239–45. In critiquing the adversary trial process, Giannelli focused on criminal proceedings, especially the lack of notice and discovery that prevailed when he wrote in the late 1970s. See *id.* Some, but not all, of the concerns he raised—lack of notice, discovery, and defense experts—have been addressed by subsequent changes in criminal procedure. Modern rules of civil procedure, of course, allow for extensive discovery of expert opinion testimony.

44. *Id.* at 1250. Elsewhere, Giannelli has observed that the relevancy test “often means that qualifying the expert automatically qualifies the technique.” GIANNELLI & IMWINKELRIED, *supra* note 4, § 1–6, at 30. See also GIANNELLI, *supra* note 8, § 24.04[B], at 314; Bert Black, *A Unified Theory of Scientific Evidence*, 56 *FORDHAM L. REV.* 595, 640–41 (1988) (criticizing the relevancy test’s reliance on the adversary trial process and discussing *Watson v. State*, 64 Wis. 2d 264, 219 N.W.2d 398 (1974)).

45. See, for example, PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 20–23 (1991), for one of “junk science’s” most vitriolic critics. For a less

In the 1990s, the federal courts adopted a reliability standard that is now set forth in Rule 702, as amended in 2000. The story is well known.⁴⁶ The Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* held that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence."⁴⁷ The "baseline" for admissibility is the "liberal" relevancy rules—Rules 401 and 402—and the Rule 702 assistance standard.⁴⁸ The Court further expressed its confidence in the adversary trial.⁴⁹ Nonetheless, federal trial judges must serve as gatekeepers to ensure that expert assistance is founded upon reliable specialized knowledge, not speculation or unsupported theories, that "fit" the facts of the case. *Daubert* suggested that when assessing reliability, the gatekeeper judges look to such factors as whether the expert's principles and methods have been tested, subjected to peer review, possess a known rate of error, or are generally accepted (*Frye* demoted) by experts in the field. In *Kumho Tire Co. v. Carmichael*, the Supreme Court held that the reliability standard extended to all experts, including those whose specialized knowledge arises from experience; it was not limited to "scientific" experts.⁵⁰ In 2000, Rule 702 was amended to reflect *Daubert* and *Kumho Tire*:

Rule 702. Testimony by Experts

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 testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵¹

splenetic viewpoint, see Giannelli, *supra* note 30, at 1199–1200, discussing the "ever-increasing use of scientific evidence."

46. See, e.g., GIANNELLI, *supra* note 8, § 24.04, at 314–22.

47. 509 U.S. 579, 587 (1993).

48. *Id.* at 587–88.

49. *Id.* at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

50. 526 U.S. 137, 141 (1999).

51. FED. R. EVID. 702.

In explaining the new rule, the federal Advisory Committee emphasized the broad discretion reposed in the gatekeeper judges, who may consider any number of factors in determining the reliability of the expert's principles, methods, or tests.⁵² The Committee also reiterated its confidence in the adversary trial process, especially the virtues of "vigorous cross-examination,"⁵³ impeachment, and cautionary jury instructions while also clarifying that "this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert."⁵⁴ Nonetheless, amended Rule 702 augmented the *Daubert* inquiry by requiring that judges also find that the expert's principles and methods were reliably applied to the facts of the case, not simply that they were reliable in and of themselves.⁵⁵ In sum, the federal courts heavily hedged their faith in the adversary trial by posting judges at the gates of admissibility with orders to admit only reliable expert testimony, as best they could determine it.

Despite its warm embrace by most jurisdictions,⁵⁶ the federal reliability standard has fomented its own set of problems, chiefly the criticism that the rule's application has been anything but reliable. The North Carolina Supreme Court neatly summed up the principle objections.⁵⁷ First, there are fundamental differences between science and law: "While the law works towards conclusiveness and finality, science operates on an evolving continuum of probabilities and likelihoods that, in many instances, is not consonant with the legal paradigm."⁵⁸ Second, despite their many talents and gifts, trial judges are ill-suited to resolve disagreements among experts, particularly scientific disputes.⁵⁹ Third, despite its promised "flexibility" and the

52. FED. R. EVID. 702 advisory committee's note on 2000 amendments. The Advisory Committee listed and discussed a number of factors over and beyond those first suggested in *Daubert*. *Id.*

53. *Id.* (quoting *Daubert*, 509 U.S. at 565).

54. *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

55. *Id.*

56. See GIANNELLI & IMWINKELRIED, *supra* note 4; see also *supra* text accompanying note 4.

57. See *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674 (N.C. 2004). North Carolina adheres to a relevancy approach that while similar to Wisconsin's is nonetheless different. The prime distinctions are that North Carolina does not list "assistance" as a discrete element and tethers the trial judge's "inherent authority" to limit or exclude expert testimony to that state's counterpart to section 904.03. See *id.* at 686.

58. *Id.* at 690.

59. *Id.* The North Carolina Supreme Court posed the dilemma for trial judges forced to act as scientific peer reviewers:

purported lowering of barriers to expert assistance, the federal reliability rule's application "has been anything but liberal or relaxed" as trial courts strictly scrutinize expert testimony, especially in products liability litigation.⁶⁰ Finally, "these stringent threshold standards for admitting expert testimony" have themselves become "case-dispositive" when used in tandem with pretrial motions for summary judgment.⁶¹ The end result may be the "unnecessar[y] encroach[ment] upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence."⁶²

Critics from within the medical profession have also attacked the federal rule as itself lacking reliability. A 2002 article in the influential *Journal of the American Medical Association* by Kassirer and Cecil took the federal standard to task because it "yielded inconsistent legal decisions in otherwise similar medical cases that involve injury from putatively toxic substances including drugs (so-called toxic tort cases)."⁶³ To the authors it seemed that "[t]he courts [were] asserting standards that they attributed to the medical profession, but that are inconsistent

One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*.

Id. The *Howerton* court then quoted from the Ninth Circuit opinion that wrestled with the *Daubert* litigation following remand by the Supreme Court:

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method."

Id. (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995)).

60. *Id.* at 691 (collecting and quoting authority).

61. *Id.*; *see infra* text accompanying notes 226–27.

62. *Howerton*, 597 S.E.2d at 692 (citing N.C. Const. art. I, § 25; *Brasher v. Sandoz Pharm. Corp.*, 160 F. Supp. 2d 1291, 1295 (N.D. Ala. 2001); *Logerquist v. McVey*, 1 P.3d 113, 131 (Ariz. 2000); *Bunting v. Jamieson*, 984 P.2d 467, 472 (Wyo. 1999)).

63. Jerome P. Kassirer & Joe S. Cecil, *Inconsistency in Evidentiary Standards for Medical Testimony: Disorder in the Courts*, 288 J. AM. MED. ASS'N 1382, 1382 (2002).

and sometimes more demanding than actual medical practice.”⁶⁴ The result is that seemingly valid claims never reach the trial stage, and “some physicians now decline in frustration to participate in legal proceedings.”⁶⁵ Although Kassirer and Cecil praise the rule’s purported purpose to “tether[] the standard for admissibility of testimony by physicians to the professional standards of medical practice,” they conclude that “[c]ourts are misled if they think they are representing medical practice.”⁶⁶

Wisconsin has thus far rejected the federal reliability standard despite strong support for the change. There have been several unsuccessful legislative attempts to adopt federal Rules 702 and 703.⁶⁷ The appellate courts have also rejected litigants’ pleas to join the federal line. In *State v. Peters*, the defendant argued that statistical evidence regarding DNA testing had been erroneously introduced because it was unreliable.⁶⁸ The court of appeals flatly rejected the argument that Wisconsin law required a finding of reliability as “a necessary condition to the admission of scientific evidence,” as does *Daubert* and *Frye*.⁶⁹ Put differently, “the rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability.”⁷⁰ *Walstad* had rejected the *Frye* standard and, it followed, that the relevancy rule too “was unaffected by *Daubert*.”⁷¹ Scientific evidence, said the *Peters*

64. *Id.*

65. *Id.*

66. *Id.* at 1382–83. Kassirer and Cecil, then, echo the criticism that judges are ill-equipped to resolve scientific disputes. They recommend impartial, independent panels of experts to assist the court, although most judges would be hard pressed to put aside any such panel’s suggested findings in a given case. *See id.* at 1387.

67. S.B. 49, 96th Leg., Reg. Sess. (Wis. 2003) (adopting the 2000 versions of Federal Rules of Evidence 701–703). Senate Bill 49 was passed by both houses of the Wisconsin Legislature but was vetoed by Governor James Doyle. S.J. 96th Leg., Reg. Sess. 740 (Wis. 2004) (Governor’s veto message regarding veto of S.B. 49). The Governor’s carefully crafted veto message observed that there was “no evidence that Wisconsin’s existing rules governing the admissibility of lay and expert witness testimony has produced unfair or illogical results. Moreover, under current law, Wisconsin judges already may reject evidence because it is superfluous, prejudicial, or inherently improbable.” *Id.* Finally, Senate Bill 49 applied only to civil cases, not to criminal prosecutions or “sexual predator” commitment cases under Wisconsin Statutes chapter 980. *Id.* According to the Governor, such a two-track approach to expert evidence invited “confusion” in the administration of justice. *Id.* The second failed legislative effort would have imposed the federal reliability regime on both criminal and civil trials. *See* Assemb. B. 278, 97th Leg., Reg. Sess. (Wis. 2005).

68. 192 Wis. 2d 674, 681, 534 N.W.2d 867, 869–79 (Ct. App. 1995).

69. *Id.* at 687, 534 N.W.2d at 872.

70. *Id.*

71. *Id.*

court, “is admissible if: (1) it is relevant, § 904.01, STATS.; (2) the witness is qualified as an expert, § 907.02, STATS.; and (3) the evidence will assist the trier of fact in determining an issue of fact, § 907.02.”⁷² Moreover, *Peters* broadly asserted that “scientific evidence is admissible under the relevancy test *regardless* of the scientific principle that underlies the evidence.”⁷³ In support of this proposition, the *Peters* court relied on the passage from *Walstad* (quoted above) that framed the issues as ones of qualifications and “credibility” which were sufficiently safeguarded by wide-open cross-examination and impeachment. Finally, as we will see in the next Part, the *Peters* court emphasized the discretionary role of the trial judge as a “limited gatekeeper” empowered to exclude any evidence, including expert testimony, that is superfluous, unduly confusing, or a waste of time.

In *State v. Davis*, the Wisconsin Supreme Court relied upon *Peters* in restating its confidence in the relevancy test:

[I]n Wisconsin, the reliability of expert testimony is an issue for the trier of fact, not the circuit court as a predicate for admissibility. Reliability of expert testimony is something that is subject to challenge on cross-examination in Wisconsin. The trier of fact must then determine the reliability of such evidence in light of differing opinions by experts. For this reason, we leave any determination on reliability of such evidence to the trier of fact.⁷⁴

The court was unperturbed by grim warnings about trials featuring a “battle of experts,” as this frequently occurred in trials regardless.⁷⁵

72. *Id.* at 687–88, 534 N.W.2d at 872 (footnotes omitted) (citing *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469, 486 (1984)).

73. *Id.* at 688, 534 N.W.2d at 872 (emphasis added).

74. *State v. Davis*, 2002 WI 75, ¶ 22, 254 Wis. 2d 1, ¶ 22, 645 N.W.2d 913, ¶ 22 (citations omitted). The Wisconsin Supreme Court also rejected overtures to adopt the federal reliability standard in *Conley Publishing v. Journal Communications*, 2003 WI 119, ¶ 35, 265 Wis. 2d 128, ¶ 35, 665 N.W.2d 879, ¶ 35 (“Whatever merit there may be in revisiting Wisconsin law on the admissibility of expert testimony in light of *Daubert*, we do not believe that this case presents the proper vehicle. The *Daubert* standard governs the admissibility of expert opinions and deals with the threshold reliability of an expert’s opinion. In the present action, the parties do not dispute the qualifications of any experts or the relevancy of their testimony. Because the admissibility of an expert’s opinion was not challenged in this appeal, the *Daubert* issue is not sufficiently present to require a decision.”).

75. *Davis*, 2002 WI 75, ¶ 20, 254 Wis. 2d 1, ¶ 20, 645 N.W.2d 913, ¶ 20. In *Davis*, the defense used expert opinion evidence to prove his character. *Id.* ¶ 16, 254 Wis. 2d 1, ¶ 16, 645

Davis, then, manifests not just the supreme court's rejection of *Daubert*, *Frye*, and a finding of reliability as a predicate for admissibility, but also the court's continuing faith in the adversary trial process, the skill of trial lawyers to expose weaknesses through cross-examination and impeachment, and the capacity of lay juries to comprehend expert testimony. Yet it is not a blind faith rule nor is the rule without defined limits.

III. CONDITIONAL RELEVANCY AND THE AUTHENTICATION OF EXPERT TESTIMONY

Although reliability is a matter of weight for the trier of fact, there are meaningful restrictions on expert testimony. Most obvious are the core elements of the relevancy test itself (relevancy, qualifications, and assistance) and the limited gatekeeping function, discussed below. Less obvious but as important is the predicate of authentication, which is implied in the supreme court's admonition that "scientific expert testimony must be 'reliable enough to be probative.'"⁷⁶ Succinctly stated, the proponent must introduce sufficient evidence to support a finding that "the matter in question is what its proponent claims."⁷⁷ In the parlance of expert testimony, the proponent must provide sufficient evidence that the witness's methods, principles, and reasoning produce reliable results or conclusions.⁷⁸ Although the jury ultimately decides the "weight" of the evidence, the judge ensures there is sufficient probative value (or "heft," if you will) to justify submitting the issue in the first instance.

Modern trial procedures subject all evidence to "gatekeeping" by the trial judge. There are two different gates. Section 901.04(1) governs preliminary questions of admissibility, where the trial judge decides all

N.W.2d 913, ¶ 16. See WIS. STAT. § 904.04(1) (2003–2004). The court was "unpersuaded" by the State's argument that each side might present opposing experts, as "a battle between experts is a frequent occurrence in criminal cases where specialized knowledge on a relevant issue is required." *Davis*, 2002 WI 75, ¶ 20, 254 Wis. 2d 1, ¶ 20, 645 N.W.2d 913, ¶ 20. See BLINKA, *supra* note 28, § 405.2 (supplement).

76. *State v. Hibl*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, ¶ 52, 714 N.W.2d 194, ¶ 52. The *Hibl* court quoted from *State v. Walstad*, 119 Wis. 2d 483, 519, 351 N.W.2d 469, 487 (1984), which in turn quoted a Louisiana case, *State v. Catanese*, 368 So. 2d 975, 979 (La. 1979). Louisiana has since elected to follow the *Daubert* rule. See *State v. Chauvin*, 2002-1188 (La. 5/20/03), 846 So. 2d 697.

77. WIS. STAT. § 909.01 (2003–2004).

78. WIS. STAT. § 909.015(9) (2003–2004). See RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 263–64 (5th ed. 2002).

issues of law and fact.⁷⁹ For example, whether evidence constitutes hearsay or falls within a hearsay exception are issues solely for the judge to determine. More pertinent, “the qualifications of a person to be a witness,” lay or expert, is specifically assigned to the judge as a preliminary question of admissibility. Only when the judge is convinced that all issues of fact and law are established by a preponderance of the evidence is the testimony or exhibit admitted into evidence.⁸⁰ The jury, then, plays no role in admissibility. The federal courts funnel the *Daubert* reliability determination through this gate.⁸¹

Other issues are said to run to the “weight” of the evidence, such as the credibility of witnesses. Yet even “weight” determinations are subject to scrutiny through the gate of conditional relevancy. Section 901.04(2) provides:

(2) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.⁸²

Here, the responsibility is shared by judge and jury—unlike section 901.04(1), where the judge decides all issues of fact and law. The judge first determines whether there is sufficient evidence from which a jury, acting reasonably, could find the predicate fact upon which the relevancy of the evidence depends. It is then up to the jury to so decide. To take a simple example, section 906.02 imposes a personal knowledge requirement on lay witnesses that is governed by conditional relevancy. Their testimony is predicated upon a sufficient showing of firsthand

79. Preliminary questions of admissibility are subject to the preponderance of the evidence standard. See GIANNELLI, *supra* note 8, § 7.02[B], at 89; BLINKA, *supra* note 28, § 104.1. See also WIS. STAT. § 909.01 (2003–2004) judicial council committee’s note; *accord* Sup. Ct. Order, 59 Wis. 2d R1, R330–R331 (1973) (discussing the distinction between conditional relevancy and preliminary questions of admissibility).

80. See WIS. STAT. § 901.04(5) (2003–2004) (“This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.”), *accord* FED. R. EVID. 104(e). For example, the judge might admit hearsay as an excited utterance—the judge being satisfied that all elements of the exception have been proved by a preponderance of the evidence—but the jury decides what weight, if any to give the evidence (e.g., was the declarant mistaken or lying?).

81. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591–92 (1993). See also FED. R. EVID. 702 advisory committee’s note.

82. WIS. STAT. § 901.04(2) (2003–2004).

knowledge: Could a reasonable jury find that the witness personally observed the event? Thus, a witness's testimony that "I saw A strike B" is usually a sufficient predicate; whether the witness is lying or mistaken is for the jury.⁸³ Yet, if the same witness asserts that she was fifty miles away at that very moment she perceived A strike B, a judge would undoubtedly find this insufficient. While credibility is the archetype of weight issues, no reasonable jury could believe her testimony.⁸⁴

To take a final example, often times evidence triggers some issues for the judge alone under section 901.04(1) as well as others involving conditional relevancy under section 901.04(2). Suppose a defendant insurer suspects that the plaintiff is feigning his injuries. At trial the insurer calls a witness who testifies that she received a phone call from the plaintiff, who said he was faking injuries in order to get more money from the insurer. A hearsay objection, followed by the proponent's response that the statement is an admission by a party opponent, raises preliminary questions of admissibility (fact and law) that the judge alone decides.⁸⁵ And the additional objection that the plaintiff never made the call (the witness is lying or an impersonator mimicked plaintiff's voice) raises the issue of authentication: Is there sufficient proof that the plaintiff "in fact" made the call?

Authentication, thus, is a special case of conditional relevancy. Section 909.01 sets forth the general rule of authentication in language that essentially restates section 901.04(2):

83. See WIS. STAT. § 906.02 (2003–2004), which states:

906.02 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

Note that section 906.02 specifically incorporates the conditional relevancy standard of section 901.04(2).

84. The personal knowledge requirement generally assumes a person has ordinary or typical powers of perception and memory. See BLINKA, *supra* note 28, § 602.1. Perception itself is confined to the five senses. Thus, the little boy in the movie *The Sixth Sense* would never be permitted to testify "I see dead people," except perhaps on cross-examination to impeach his credibility (a "defect" in his mental capacity). See GIANNELLI, *supra* note 8, § 22.05, at 266; BLINKA, *supra* note 28, §§ 602.1, 607.4.

85. WIS. STAT. § 908.01(4)(b)(1) (2003–2004). The judge decides all issues of fact and law, including whether it is more likely than not that the plaintiff made the call. Assuming the judge so finds, the jury will not be informed of the judge's admissibility decisions. GIANNELLI, *supra* note 8, § 32.10[D], at 464.

909.01 General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.⁸⁶

“Illustrations” of common authentication scenarios are provided in section 909.015, which includes subsection (9):

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.⁸⁷

Absent judicial notice, the predicate showing usually must be provided by a witness with specialized knowledge (an expert).⁸⁸ Section 909.015(9) literally illustrates that the expert’s specialized knowledge, whether it consists of theories, principles, methods, tests, or reasoning borne of just plain “specialized” experience, must satisfy the modest requirement of conditional relevancy. To take another easy example, were counsel desperate (or daft) enough to call a necromancer (one who purportedly communicates with the dead) as a witness, the trial judge would have little difficulty excluding the testimony on grounds that no jury, acting reasonably, could find such testimony reliable or accurate.⁸⁹

A more realistic, troublesome scenario involves so-called *ipse dixit* (“he himself said it”) testimony by experts who are unwilling or unable to explain the reasoning or methodology underlying their opinions.⁹⁰ Conceding that experts have wide latitude in, and varying aptitudes for,

86. WIS. STAT. § 909.01 (2003–2004).

87. The Wisconsin rules tracked the original federal rules in offering section 909.015 as a set of “illustrations” rather than “rules.” See FED. R. EVID. 901 advisory committee’s note.

88. See, e.g., 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 901:9 (6th ed. 2006) (collecting cases). See also CARLSON ET AL., *supra* note 78.

89. The Supreme Court mentioned necromancy and astrology to illustrate the shortcomings of any test that considers only “general acceptance.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). In short, the community of astrologists and necromancers may have generally accepted beliefs and practices, but “the discipline itself lacks reliability.” *Id.*

90. *Id.* at 157 (“Of course, [the expert] himself claimed that his method was accurate, but . . . ‘nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.’” (citation omitted)).

explaining their opinions, there does reach a point when “it’s tough to explain, but . . .” becomes little more than “trust me, I’m right.” Trial judges must be accorded great deference in determining whether the expert’s testimony offers a sufficient basis from which a reasonable jury could find the opinion testimony, and its underlying explanation, reliable.⁹¹ And in some cases an inability to articulate the underlying rationale may be grounds for ruling that the conditional relevancy standard has not been satisfied.

The authentication standard does not demand the intricate, complex “pavane” that *Daubert* seemingly entails.⁹² The federal reliability approach compels the judge to make two sets of findings: first, what “factors” comprise the criteria for determining reliability? Second, are the expert’s methodology and theories reliable under those criteria?⁹³ A conditional relevancy approach to reliability is fundamentally different because the judge need only determine whether there is sufficient evidence to support a reasoned decision by the jury. The judge, then, is not expected to mediate scientific disputes on the merits but rather to determine only whether the issues may be fairly disputed within the framework of the adversary trial. The “indices of reliability” will be necessarily case-specific.⁹⁴ On appellate review, judges will find an

91. See FED. R. EVID. 702 advisory committee’s note, which, in addressing this problem, observed that the federal “trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” The same holds even under the conditional relevancy standard of scrutiny.

92. See *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 690 (N.C. 2004) (quoting *Ruiz-Troche v. Pepsi-Cola.*, 161 F.3d 77, 81 (1st Cir. 1998) (“[C]horeographing the *Daubert* pavane remains an exceedingly difficult task”). A “pavane” is defined as a “stately court dance” of early modern Europe. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 909 (11th ed. 2003).

93. Under Federal Rule of Evidence 702, reliability of the methods and tests are preliminary questions for the judge, who decides all issues of fact and law by a preponderance of the evidence. The rule compels the federal gatekeeper to first erect the gate, that is, to determine what factors (peer review, etc.) establish the criteria for reliability in a given case and then decide whether the expert’s methods, and their application, are in conformity. See FED. R. EVID. 702 advisory committee’s note on the 2000 amendments (“[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a),” including the responsibility of identifying “factors relevant in determining whether expert testimony is sufficiently reliable.”). See also GIANNELLI, *supra* note 8, § 24.04[E] (discussing “*Daubert* factors”). Thoughtful critics have argued that the federal courts’ reliability determinations are themselves inconsistent, conflicting, and thus unreliable. See, e.g., Kassirer & Cecil, *supra* note 63.

94. See *Howerton*, 597 S.E.2d at 687 (finding that in cases where legal precedent provides no guidance, “the trial court should generally focus on the following nonexclusive ‘indices of reliability’ to determine whether the expert’s proffered scientific or technical method of proof is sufficiently reliable: ‘the expert’s use of established techniques, the

abuse of discretion only when no reasonable jury could have relied on the expert's testimony.⁹⁵ One might argue that the conditional relevancy approach sacrifices precision in decision making, but *Daubert's* critics will counter that Rule 702's promise of precision has not been kept in any event.⁹⁶

In sum, the reliability of an expert's theories, methods, and tests, as well as their application to the facts, are governed by the conditional relevancy standard. This conclusion follows from the rules of evidence, where it is explicitly set forth, and is implicit in the case law, particularly the Wisconsin Supreme Court's admonition that "scientific expert testimony must be 'reliable enough to be probative.'"⁹⁷ Finally, it is also fully consistent with, if not inherent in, both the general relevancy test itself and the limited gatekeeping function to which we now turn.⁹⁸

IV. THE LIMITED GATEKEEPING FUNCTION

The limited gatekeeping function, first labeled as such in *Peters*, was hardly a novel gloss on the relevancy test, which had never been a rule of free proof. McCormick, an early, ardent supporter, framed the relevancy test as one in which probative value must be balanced against countervailing reasons for exclusion:

Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, unfair surprise and undue consumption of time.⁹⁹

expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting [the] scientific hypotheses on faith, and independent research conducted by the expert.'" (internal quotations omitted) (citing authority)).

95. Although it is far too early to predict developments with any certainty, this approach may encourage appellate courts (and lawyers) to identify boundaries in the case law, as has occurred with respect to polygraphs and expert testimony on mental capacity to form criminal intent, neither of which is admissible. See *infra* text accompanying notes 134–38.

96. See *supra* text accompanying notes 56–66.

97. *State v. Hibel*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, ¶ 52, 714 N.W.2d 194, ¶ 52 (citations omitted).

98. Authentication of the expert's methods, tests, and principles, it is contended, should be examined when considering the relevancy element. See *infra* text accompanying notes 157–70.

99. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 363–64 (1954), quoted in Giannelli, *supra* note 30, at 1233.

More recently, influential evidence scholars such as Giannelli have concurred that the relevancy test, while a liberal admissibility standard, empowers trial judges to limit expert evidence. The probative value of the expert's testimony must be balanced against the risks associated with misleading the jury, confusion, and undue prejudice, which in turn are now rooted in federal Rule 401(relevancy) and Rule 403 (the balancing test).¹⁰⁰ (The corresponding Wisconsin rules of evidence are identical.)

Wisconsin authority also anticipated the *Peters* limited gatekeeping function. At about the same time as the creation of the Wisconsin Rules of Evidence in 1974, case law relied upon McCormick's formulation of the relevancy test, especially the admonition that the probative value of expert testimony must be weighed against "the familiar dangers of prejudicing or misleading the jury, and undue consumption of time."¹⁰¹ The Judicial Council's note to section 907.02, as we have seen, supported the assistance standard yet accorded the trial judge discretion to exclude evidence with little or no probative value.¹⁰² And in clarifying that *Frye* was anathema to the relevancy test, *Walstad* explicitly invoked the Judicial Council Committee's limits:

As the commentary to Rule 907.02 points out, under Rule 907.02, expert testimony is admissible if relevant

100. Giannelli, *supra* note 30, at 1235. See also GIANNELLI & IMWINKELRIED, *supra* note 4, § 1-6, at 31-33 (discussing the relevancy test in terms of Federal Rules of Evidence 401 and 403 and summarizing it as a three-step test: "first, ascertaining the probative value of the evidence; second, identifying any countervailing dangers or considerations; and third, balancing the probative value against the identified dangers or considerations"). In the discussions that follow, it is contended that the relevancy test, as construed by the courts, is not restricted to section 904.01 through section 904.03 (the Wisconsin equivalents to the corresponding federal rules). In particular, section 907.02 permits a judge to exclude expert testimony if it is, for example, superfluous or a waste of time, and even when the countervailing considerations are evenly balanced against probative value.

101. *Watson v. State*, 64 Wis. 2d 264, 273, 219 N.W.2d 398, 403 (1974) (quoting EDWARD W. CLEARY ET AL., MCCORMICK HANDBOOK OF THE LAW ON EVIDENCE § 203 (2d ed. 1972)). It should be observed that the quote from MCCORMICK's second edition is nearly identical to the corresponding passage in the first edition, quoted in the text accompanying note 99, with the notable exception of the deletion of "unfair surprise."

102. WIS. STAT. § 907.02 (2003-2004) judicial council committee's note ("With such a test expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time." (citing Wisconsin case law)); accord *Sup. Ct. Order*, 59 Wis. 2d R1, R207 (1973).

and will be excluded only if the testimony is superfluous or a waste of time.¹⁰³

What is critical here, and easy enough to overlook, is that the *Walstad* court referenced only section 907.02, not the balancing test in section 904.03, which excludes evidence only if its probative value is *substantially* outweighed by unfair prejudice or other dangers. It seems then that section 907.02 confers broader power on the court to exclude, limit, or modify expert testimony than does section 904.03. Before considering this point more closely, it is appropriate to first discuss *Peters'* explication of the limited gatekeeping function.

The *Peters* court, as we have seen, confirmed Wisconsin's continuing adherence to the relevancy test and rejected *Daubert's* construction of the parallel, and identical, Federal Rules of Evidence.¹⁰⁴ The reliability of an expert's principles, methods, or tests was not a predicate to admissibility; rather, it was a function of his or her credibility, an issue of weight left to the trier of fact.¹⁰⁵ To underscore its point, *Peters* proclaimed that "scientific evidence is admissible under the relevancy test regardless of the scientific principle that underlies the evidence."¹⁰⁶ Yet anyone who thought that the relevancy test opened the courtroom's doors to necromancers as well as neurologists was plainly mistaken because "Wisconsin judges do serve a limited and indirect gatekeeping role in reviewing the admissibility of scientific evidence."¹⁰⁷

And how do judges fulfill the role of limited gatekeeper? In contrasting the federal rule, the *Peters* court explained only that the "role is much more oblique and does not involve a direct determination as to the reliability of the scientific principle on which the evidence is based."¹⁰⁸ It then offered six illustrations in which "Wisconsin judges

103. *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469, 486 (1984). Although the supreme court did not explicitly cite the committee's note, the quoted language and context leaves little reasonable doubt that it is from the Judicial Council Committee's note to section 907.02, quoted above, *supra* note 102.

104. *See State v. Peters*, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995). *Peters* was decided in 1995, before the federal rules were amended to reflect the holdings in *Daubert* and the later *Kumho Tire* case. In 1995, then, Wisconsin's pertinent rules of evidence were identical to the corresponding federal rules. *Compare* WIS. STAT. § 907.02, *with* FED. R. EVID. 702 *as discussed in* *Daubert v. Merrel Dew Pharmaceuticals, Inc.*, 509 U.S. 579, 587-88 (1993).

105. *Peters*, 192 Wis. 2d at 685-92, 534 N.W.2d at 871-75.

106. *Id.* at 688, 534 N.W.2d at 872.

107. *Id.*

108. *Id.* at 689, 534 N.W.2d at 872-73.

may reject relevant evidence,” noting that the “list is not an exhaustive inventory of those grounds upon which the trial court may rely in refusing to admit relevant evidence.”¹⁰⁹ We will consider each illustration in turn, although they are not mutually exclusive and overlap to a considerable extent both with one another and the core elements of the relevancy test—qualifications, assistance, and relevancy.

First, expert testimony may be excluded if it is “superfluous.”¹¹⁰ The term is undefined, although the cases and commentary on the relevancy rule invariably list it among the chief limiting factors.¹¹¹ The dictionary defines “superfluous” as “unnecessary, esp[ecially] through being more than enough.”¹¹² And the phrase “more than enough” is truly the operative language, as the assistance standard of section 907.02 eschewed the common law’s necessity test in favor of one open and inviting to specialized knowledge that may help the trier of fact. Since the assistance standard is generous and because almost any qualified expert may assist the trier in better understanding the facts, the issue is how much courtroom education will the testimony provide, to what degree will it assist the trier of fact, and for what purposes will the testimony be admitted? Thus, in a routine personal injury case the trial judge will likely not suffer an expert’s explanation of the engineering principles that underlie the internal combustion engine except as it might bear on the disputed issues (e.g., stopping distance). Undoubtedly, the trier of fact could learn things it did not know before, but the education may be “more than enough.”¹¹³

Closely related is the second factor: “waste of judicial time and resources.”¹¹⁴ Earlier commentary and cases had paired “waste of time” with “superfluous,”¹¹⁵ but the *Peters* formulation tellingly emphasized the drain on “judicial time and resources.”¹¹⁶ Even if one concedes that an expert’s testimony may assist the trier of fact, is it worth spending

109. *Id.* at 689–90, 534 N.W.2d at 873.

110. *Id.* at 689, 534 N.W.2d at 873.

111. *See id.* (citing *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469, 486 (1984)).

112. THE OXFORD AMERICAN COLLEGE DICTIONARY 1384 (2002).

113. One may also be tempted to object that such testimony is irrelevant, but the extraordinarily broad definition of relevancy in section 904.01 encompasses all evidence that has “any tendency,” no matter how slight, to make a consequential proposition more or less likely. *See* WIS. STAT. § 904.01 (2003–2004). In short, the issue here is whether even relevant evidence is superfluous and subject to exclusion without resort to the weighted balancing test of section 904.03.

114. *Peters*, 192 Wis. 2d at 689, 534 N.W.2d at 873.

115. *See, e.g., Walstad*, 119 Wis. 2d at 516, 351 N.W.2d at 487 (1984).

116. *Peters*, 192 Wis. 2d at 689, 534 N.W.2d at 873.

hours of trial time in direct examination and cross-examination, especially if opposing counsel may feel compelled to present its own expert to contradict the first? In short, expert assistance carries real costs that the trial judge must calculate. The decision is, of course, discretionary.¹¹⁷

Third, the *Peters* court observed that section 904.03 may constitute an additional ground for excluding evidence, particularly when the evidence is prejudicial.¹¹⁸ The court did not elaborate on the interplay between sections 904.03 and 907.02, but it seems likely that its point was to emphasize the prejudice factor.¹¹⁹ And by listing section 904.03 as a third, and separate, factor, *Peters* confirmed that section 907.02 carries its own balancing test of sorts: one that gives the trial judge far greater latitude to exclude relevant, even helpful evidence than does section 904.03, a point considered in greater detail below.

Fourth, the judge may exclude an expert's testimony where "the jury is able to draw its own conclusions without it."¹²⁰ *Peters* cited without discussion *Valiga v. National Food Co.*,¹²¹ a lawsuit brought by mink ranchers for damages caused by contaminated mink food. In *Valiga*, the trial court excluded expert testimony on the issue of damages by a defense expert, a certified public accountant (CPA), who the court found unqualified to testify about the value of mink.¹²² Although the CPA held certain other opinions, they were founded upon tax returns and other documents that had been received into evidence.¹²³ For this reason, the judge also ruled that the jury could determine these facts without the CPA's testimony.¹²⁴ The supreme court affirmed.¹²⁵

117. The phrase "waste of time" also appears in section 904.03, but *Peters*, *Walstad*, and other formulations of the relevancy test pair "waste of time" with "superfluous" entirely apart from section 904.03. See *id.* at 689, 534 N.W.2d at 873; *Walstad*, 119 Wis. 2d at 516, 351 N.W.2d at 487. In short, neither "superfluous" nor "waste of time" are governed by the weighted balancing test of section 904.03.

118. *Peters*, 192 Wis. 2d at 689, 534 N.W.2d at 873.

119. The court described the third factor as follows: "the probative value of the evidence is outweighed by its prejudice to the defendant." *Id.* This description, even as a shorthand, is inaccurate in two respects. First, section 904.03 uses the phrase "unfair prejudice," not simple prejudice. See BLINKA, *supra* note 28, § 403.1. Second, the probative value must be substantially outweighed by the danger of unfair prejudice (or such) before the judge may exclude it in her discretion. *Id.*

120. *Peters*, 192 Wis. 2d at 689, 534 N.W.2d at 873.

121. 58 Wis. 2d 232, 206 N.W.2d 377 (1973).

122. *Id.* at 251, 206 N.W.2d at 387-88.

123. *Id.* at 252, 206 N.W.2d at 388.

124. *Id.* at 251, 206 N.W.2d at 387.

125. *Id.* at 260, 206 N.W.2d at 392.

Emphasizing the discretionary nature of these rulings, the supreme court also strongly implied that the jury could draw its own conclusions, especially because the CPA relied solely on income tax returns. The true measure of damages, it observed, was the “fair market value of the mink and not the plaintiffs’ net profit or loss for a given year.”¹²⁶ *Valiga*, then, illustrates the broad discretion granted to trial judges to determine whether an expert may assist a jury in light of his qualifications, the nature of the issue to be resolved, and the underlying evidence relied upon by the expert.

Fifth, the judge may consider whether “the evidence is inherently improbable,” a factor that presents perhaps the sternest test for when reliability may be safely left to a lay trier of fact.¹²⁷ Again without elaboration, the *Peters* court cited a divorce case, *Peterson v. Peterson*, which also involved an accountant.¹²⁸ The alleged error in *Peterson* involved the trial judge’s determination that the husband’s retirement plan had no value.¹²⁹ Although the wife offered the accountant’s opinion that the retirement plan had a value exceeding \$10,000, the trial judge rejected the opinion because it rested upon too many unwarranted assumptions.¹³⁰ The court of appeals affirmed. The trial court had properly exercised its discretion “in concluding that the accountant’s testimony as to valuation was speculative and improbable.”¹³¹ At first look, *Peterson* seems inapt as an illustration, especially because the issue concerned a finding of fact, not the admissibility of evidence, and mostly concerned inadequacies in reasoning and factual bases. Case law long recognized that “[a] court is not obliged to adopt even uncontradicted testimony if it is inherently improbable or if there is other evidence in the case that renders it against reasonable probabilities.”¹³² Yet, the telling point is that a judge need not uncritically accept testimony that he or she believes is unsupported by evidence or that is speculative and improbable. And while *Peterson* involved a family court bench trial and a fact finding, the *Peters* case extended the principle to the admissibility of expert testimony in civil and criminal cases generally. Reliability of an expert’s principles, methods, or tests may be safely left to the jury

126. *Id.* at 252, 206 N.W.2d at 388.

127. *State v. Peters*, 192 Wis. 2d 674, 689, 534 N.W.2d 867, 873 (Ct. App. 1995).

128. *Id.* (citing *Peterson v. Peterson*, 126 Wis. 2d 264, 266, 376 N.W.2d 88, 89 (Ct. App. 1985)).

129. *Peterson*, 126 Wis. 2d at 266, 376 N.W.2d at 89.

130. *Id.*, 376 N.W.2d at 89.

131. *Id.*, 376 N.W.2d at 89.

132. *Id.*, 376 N.W.2d at 89.

where they are reasonably disputed, but where the judge is satisfied that the expert's reasoning or bases are "speculative and improbable," the judge need not stand helplessly by while such pap is spread before the jury. *Peterson*, then, in effect represents an application of conditional relevancy and the principle that the expert's methodology must be authenticated.¹³³

Sixth, where public policy has declared that an "area of testimony is not suitable for expert opinion," the judge must, of course, so abide.¹³⁴ Although content to list the first five factors along with terse citations, the *Peters* court labored to reconcile this "unsuitable for expertise" factor with its holding that reliability is ordinarily left to weight and credibility. Case law has declared several areas of erstwhile-specialized knowledge unreliable as a matter of law. In *State v. Flattum*, the Wisconsin Supreme Court held that during the guilt phase of a criminal trial "psychiatric testimony regarding a defendant's capacity to form intent is inadmissible for lack of reliability."¹³⁵ The *Flattum* holding built in turn upon earlier cases, especially *Steele v. State*, which concluded that "the state of psychiatric science was not sufficiently advanced" to determine the defendant's ability to consciously form a criminal purpose.¹³⁶ And case law also declared polygraph evidence inadmissible because it was insufficiently reliable.¹³⁷ Neither line of cases, however, undercut the essential rationale of the relevancy rule, which was to avoid the "type of ad hoc reliability determination envisioned" by *Daubert* and the federal rule.¹³⁸ In short, such lines of cases were likely to be few and embodied reasoned public policy determinations by appellate courts in published opinions. Adhering to case law precedent presented none of the vices or difficulties of trial judges struggling to

133. See *supra* text accompanying notes 86–96.

134. *State v. Peters*, 192 Wis. 2d 674, 689, 534 N.W.2d 867, 873 (Ct. App. 1995) (citing *State v. Flattum*, 122 Wis. 2d 282, 289–90, 361 N.W.2d 705, 709–10 (1985)).

135. *Id.* at 689 n.8, 534 N.W.2d at 873 n.8. (citing *Flattum*, 122 Wis. 2d at 289–90, 361 N.W.2d at 709–10).

136. *Id.*, 534 N.W.2d at 873 n.8 (discussing *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980)). The *Flattum* court further observed that "[p]erhaps the most fundamental problem with the admission of psychiatric opinion evidence on the question of the defendant's capacity to form the requisite intent when that opinion is based on the defendant's mental health history is the inconsistency between the law's conception of intent and the psychiatric community's understanding of the term." *Flattum*, 122 Wis. 2d at 291, 361 N.W.2d at 710.

137. See *Peters*, 192 Wis. 2d at 689 n.8, 534 N.W.2d at 873 n.8 (discussing *State v. Dean*, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981)).

138. *Id.* at 689 n.8, 534 N.W.2d at 873 n.8.

determine the reliability of some expert's methods on a case-by-case basis.

V. LIMITED GATEKEEPING IN PERSPECTIVE

Peters, then, signaled several important developments in the law governing expert evidence. First, the relevancy test had limits that were to be taken seriously. While accommodating expert assistance, section 907.02 did not open the evidentiary spillways to anything and everything creative lawyers deem helpful to their positions. “[T]hrough their limited gatekeeping functions,” trial judges “may restrict the admissibility” of expert testimony.¹³⁹ Moreover, the judges’ decisions were discretionary and would not be overturned on appeal absent an abuse of that discretion.¹⁴⁰

Second, *Peters* presented a wide array of factors that judges may consider when deciding whether to restrict expert testimony. The six factors discussed above were, the court said, only illustrative and not an “exhaustive inventory.”¹⁴¹ As a whole, if not individually, these factors conferred far-reaching power that went well beyond section 904.03 (the third *Peters* ground). Under section 904.03, the judge may exclude, restrict, or even remold evidence, but only where the judge finds that its probative value is *substantially outweighed* by other considerations or dangers, such as unfair prejudice, confusion, or waste of time. Yet *Peters* also recognized that section 907.02 carries its own weighing test of sorts that permits far greater flexibility than section 904.03. Under section 907.02 a trial judge may restrict or exclude expert testimony whenever it appears that its probative value is offset by, or perhaps evenly arrayed against, objections that it is superfluous or a waste of time.¹⁴² The broader discretion is essential because of the extraordinary problems presented by the expert testimony, which is nearly always

139. *Id.* at 690, 534 N.W.2d at 873.

140. *Id.* at 685, 534 N.W.2d at 871.

141. *Id.* at 690, 534 N.W.2d at 873.

142. McCormick’s 1954 formulation of the relevancy test asks whether the probative value of the evidence is “overborne” by other risks, such as prejudice or misleading the jury. See GIANNELLI, *supra* note 8, § 24.04[B], at 314 n.51 (quoting MCCORMICK, *supra* note 99, § 171, at 363–64). Some case law presents the issue as turning on a finding that the evidence is superfluous or a waste of time irrespective of any balancing test. See, e.g., *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469, 486 (1984) (“[E]xpert testimony is admissible if relevant and will be excluded only if the testimony is superfluous or a waste of time.”). See also WIS. STAT. § 907.02 (2003–2004) judicial council committee’s note; *accord* *Sup. Ct. Order*, 59 Wis. 2d R1, R207 (1973). In any event, the trial judge has discretion in making the ruling, so the distinction is probably of little moment.

suffused with hearsay, often couched in a specialized argot that may confuse or beguile the uninitiated, and invariably directed at the ultimate issues for the trier of fact.¹⁴³ In assuring that the expert testimony assists the trier of fact, the broad latitude to limit or exclude evidence found in section 907.02 will likely be of greater use than the default balancing test of section 904.03.

Third, limited gatekeeping is fully consistent with the determination of reliability as an issue of conditional relevancy, particularly as “illustrated” by *Peters*’ last two examples.¹⁴⁴ Reliability may go to weight, but this does not mean that the trial judge is helpless, playing no role whatsoever in assessing the testimony’s reliability. An expert’s testimony is admissible only when the judge finds that there is sufficient evidence from which a jury, acting reasonably, could find the expert’s principles, methods, or tests to be reliable.

Fourth, the limited gatekeeping function set forth in *Peters* protects a very different set of interests than those protected by *Daubert* and the federal rules. The *Daubert* gatekeeping function is one focused on the reliability of an expert’s principles, methods, or tests; in pursuit of accurate judicial fact finding, it demands that parties rely only on “reliable” science or other specialized knowledge as determined by the gatekeeper judge without assistance from the jury. *Peters* guards a different set of gates. The limited gatekeeping function is directed at assuring the fairness of fact finding within the framework of the adversary trial. The focus then is on the information (evidence) presented in the courtroom, not the state of the art or science in a laboratory or college classroom. And the principle of conditional relevancy represents the shared responsibility of the judge and trier of fact.

Finally, recent case law shows the saliency of the limited gatekeeping principle and the need for further refinement by the courts. In *State v. Hibl*, the Wisconsin Supreme Court endorsed the “limited gate-keeping function” by recognizing the trial court’s discretion to admit, limit, or

143. The *Daubert* court cited many of these same reasons in explaining the need for a reliability standard. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (“Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See [FED. R. EVID.] 702[,] 703. Presumably, this relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.”).

144. See *supra* text accompany notes 76–91 (conditional relevancy) and 127–138 (*Peters* illustrations numbers five and six).

exclude both lay and expert testimony on eyewitness identification.¹⁴⁵ Conceding that juries are usually able to evaluate eyewitness identification without expert assistance, the court nonetheless implied that there are some circumstances in which a jury might profit from an expert's specialized knowledge.¹⁴⁶ In light of their multiplicity and complexity, it declined to offer an "inflexible list of factors" and entrusted the matter to "litigants and trial courts."¹⁴⁷ And although *Hibl* references only section 904.03, and not *Peters*, in its brief discussion of the trial court's broad discretion, the supreme court's admonition that "scientific expert testimony must be 'reliable enough to be probative'" is at once consistent with *Peters* and the framing of reliability as an issue of conditional relevancy.¹⁴⁸

Thus, the limited gatekeeping function is firmly ensconced in Wisconsin's evolving relevancy rule. And it is against this backdrop that we now consider the core elements of the relevancy test.

VI. THE RELEVANCY TEST RECONSIDERED

The limited gatekeeping function backlights the relevancy standard, bringing into sharper focus its elements of relevance, qualifications, and assistance. The ordering of these elements is important. Relevance itself is the threshold. The witness's qualifications will in turn determine how much assistance, if any, this witness's testimony may provide the jury and the form it might take. Limited gatekeeping is primarily involved in evaluating the functional link between qualifications and assistance. We will consider each element in turn while keeping in mind that conditional relevancy governs the reliability of the expert's theories, tests, and methods, as well as their application.

145. 2006 WI 52, ¶ 52, 290 Wis. 2d 595, ¶ 52, 714 N.W.2d 194, ¶ 52.

146. *Id.* ¶ 53, 290 Wis. 2d 595, ¶ 53, 714 N.W.2d 194, ¶ 53.

147. *Id.* ¶ 54, 290 Wis. 2d 595, ¶ 54, 714 N.W.2d 194, ¶ 54 (referencing paragraph 40 of the opinion, in which the court discussed "phenomena" outside lay "common knowledge" that may in turn justify either the use of expert testimony to assist the jury or the exclusion of lay identification testimony all together). See *State v. Shomberg*, 2006 WI 9, ¶ 17, 288 Wis. 2d 1, ¶ 17, 709 N.W.2d 370, ¶ 17 (suggesting that trial courts are, or should be, more receptive to expert testimony on "factors that influence identification and memory").

148. *Hibl*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, ¶ 52, 714 N.W.2d 194, ¶ 52 (referring to language in *State v. Walstad*, 119 Wis. 2d 483, 519 351 N.W.2d 469 (1984)). At oral argument the parties agreed that section 904.03 had a "role to play in the context of the reliability of eyewitness identification evidence." *Id.* ¶ 51, 290 Wis. 2d 595, ¶ 51, 714 N.W.2d 194, ¶ 51. There was scant opportunity for the court to distinguish the application of the limited gatekeeping function in the "context" of lay versus expert testimony.

A. Is the Testimony Relevant?

Relevancy is, in the truest sense, the prime element of the test that carries its name. This is noteworthy only because relevance is often swallowed by the focus on qualifications, assistance, and limited gatekeeping. McCormick's original definition declared that "[a]ny relevant conclusions which are supported by a qualified expert witness should be received" into evidence.¹⁴⁹ Although relevancy is expansively defined under present rules, the concept is not without bounds and provides the court with the means to regulate expert testimony.

Relevancy is defined by section 904.01, which provides:

904.01 Definition of "relevant evidence". "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁵⁰

The definition of relevancy "has two facets."¹⁵¹ First, the evidence must relate "to a fact or proposition that is of consequence to the determination of the action."¹⁵² Consequential propositions are determined with reference to the parties' pleadings and the substantive law; put differently, they are a function of the claims and defenses asserted by the parties in the complaint, the answer, and other responsive pleadings, which in turn are grounded in the law of torts, contract, property, etc.¹⁵³ Second, the evidence must have "a tendency to make a consequential fact more probable or less probable than it would be without the evidence."¹⁵⁴ The tendency may be found in common sense and everyday experience; it is not simply an exercise in logic (deductive or inductive) nor one confined to case law. Most often, the judge's own education, experience, and intuition furnishes the standard, although counsel may play a critical role in articulating his or her theory of admissibility.¹⁵⁵ Relevancy, then, is a preliminary question

149. See MCCORMICK, *supra* note 99, § 171, at 363–64.

150. WIS. STAT. § 904.01 (2003–2004).

151. *State v. Sullivan*, 216 Wis. 2d 768, 785, 576 N.W.2d 30, 38 (1998).

152. *Id.*

153. *Id.* See BLINKA, *supra* note 28, § 401.101 (collecting authority).

154. *Sullivan*, 216 Wis. 2d at 786, 576 N.W.2d at 39.

155. BLINKA, *supra* note 28, § 401.102 (collecting authority).

of admissibility for the trial judge, whose decision will stand on appeal absent an abuse of discretion.¹⁵⁶

Although experts may assist the judge in determining relevancy, the ultimate decision rests with the judge because the expert's reasoning or methods may conflict with core legal standards or values.¹⁵⁷ As previously discussed, the *Flattum-Steele* line of cases holds inadmissible any testimony by psychologists or psychiatrists regarding a person's capacity to form criminal intent during the guilt phase of a trial. They embody the finding that many mental health professionals harbor conceptions of the mind and human behavior that are so radically different from those in the law that their testimony cannot provide relevant, helpful evidence.¹⁵⁸

Nor are concerns about relevance confined to an expert's opinions and conclusions; rather, they may extend to the expert's methodology, reasoning, and underlying bases, as illustrated by *Bittner v. American Honda Motor Co.*¹⁵⁹ Bittner was seriously injured when his Honda three-wheel ATV overturned.¹⁶⁰ No one witnessed the accident. Plaintiffs sued Honda for strict products liability and negligence, contending that the ATV was defective, unreasonably dangerous, and that Honda was negligent in its design and sale.¹⁶¹ A jury found in favor of Honda. The supreme court reversed because Honda had heavily relied upon expert testimony that compared the risk from injury in operating a Honda ATV with myriad other activities.¹⁶² During three days of testimony, Honda's expert, Roger McCarthy, "compared the risk of injury associated with ATVs to products and activities such as bicycle riding, water skiing, roller skating, scuba diving, and driving various automobiles."¹⁶³ Among many proffered purposes, Honda asserted that McCarthy's fascinating testimony "demonstrate[d] that ATV riding is not disproportionately dangerous when compared to

156. See *id.* § 401.1 (collecting authority).

157. See *State v. Brewer*, 195 Wis. 2d 295, 309, 536 N.W.2d 406, 412 (Ct. App. 1995) ("[E]xpert testimony . . . provided the probative link between the gang graffiti and the crime charged—that the graffiti evidence has a tendency to show drug activity.").

158. See *supra* text accompanying notes 134–38. See also Walter Dickey, Frank Remington & David Schultz, *Law, Trial Judges, and the Psychiatric Witness – Reflections on How a Change in Legal Doctrine Has Been Implemented in Wisconsin*, 3 INT'L J.L. & PSYCHIATRY 331–41 (1980).

159. 194 Wis. 2d 122, 533 N.W.2d 476 (1995).

160. *Id.* at 129, 533 N.W.2d at 478.

161. *Id.* at 131–32, 533 N.W.2d at 479–80.

162. *Id.* at 154–55, 533 N.W.2d at 489.

163. *Id.* at 138, 533 N.W.2d at 482.

other recreational activities and sports.”¹⁶⁴ In substance, McCarthy’s testimony constituted a quantified form of “other act” evidence offered to prove that Honda’s ATV was neither defective nor unreasonably dangerous.

In reversing and ordering a new trial, the supreme court held that evidence of “dissimilar modes of recreation or transportation” had “no relevance to the manufacturer’s duty of care with regard to the design, manufacture, or sale of its particular product.”¹⁶⁵ The list of dissimilar activities included “skiing, bicycle riding, scuba diving, football, and passenger automobiles.”¹⁶⁶ Nothing in *Bittner* raised issues about McCarthy’s qualifications (which were impressive) or his application of quantitative methodology.¹⁶⁷ Moreover, his testimony was hardly within the “ken” of lay knowledge and undoubtedly taught the jury much about risk in the modern world. The present point is not, however, to explore *Bittner*’s approach to comparative risk evidence, especially in its statistical form, but rather to emphasize that the court’s holding rested squarely on its determination of relevance under section 904.01.

The *Bittner* court had no occasion to discuss section 907.02 or the relevancy test governing expert testimony. Indeed, *Bittner*’s silence on expert testimony in general only underscores the salience of its relevancy analysis.¹⁶⁸ Educated and experienced in engineering, statistics, and risk assessment, McCarthy saw no difficulty in comparing risks associated with ATVs to a broad range of conduct, including the rollover rate of Corvettes.¹⁶⁹ Yet it was the court’s responsibility to construe the acceptable sweep of “similar activities” and thereby decide what an expert could, and could not, rely upon when comparing risk.

164. *Id.*, 533 N.W.2d at 482.

165. *Id.* at 151, 533 N.W.2d at 487.

166. *Id.* The court ruled, however, that “although differing in design” the risk associated with other recreational products, such as snowmobiles, minibikes, and trailbikes, could be compared to ATVs because of their “similar purpose.” *Id.* at 149, 533 N.W.2d at 487.

167. For McCarthy’s credentials, see Exponent – Roger L. McCarthy, http://www.exponent.com/leaders/bios/roger_mccarthy.asp?employeeID=96 (last visited Oct. 20, 2006).

168. Although section 904.03 is cited and discussed, the pertinent holding in *Bittner* is squarely grounded in the relevancy determination itself. Section 907.02 is not cited or discussed anywhere in the opinion.

169. *Bittner*, 194 Wis. 2d at 139, 533 N.W.2d at 482–83 (“McCarthy subsequently compared the rollover rate of Corvettes to other passenger vehicles to demonstrate that automobiles with a high center of gravity rollover with less frequency than automobiles, such as the Corvette, with a low center of gravity because the rollover rate is attributable to the driver rather than, as plaintiff’s engineer suggested, to the design of the vehicle.”).

In sum, while experts may inform and enlighten courts on what evidence may “tend” to prove, the trial judge ultimately determines what the trier of fact may reasonably infer from the proof. The cases discussed above are, in essence, instances in which expert witnesses speak a language that cannot be translated in the courtroom. Irrelevant evidence cannot, by definition, provide any assistance.¹⁷⁰ The cases are also consistent with the earlier discussion of authentication under the conditional relevancy standard. Thus, the *Bittner* court effectively found that no jury, acting reasonably, could find McCarthy’s comparative risk analysis reliable with respect to dissimilar activities. Because authentication is an aspect of relevancy generally, it follows that the reliability of an expert’s principles, methods, and tests should be assessed not only under section 904.01 but also under the conditional relevancy standards found in sections 901.04(2) and 909.01.

B. Is the Expert Qualified to Answer The Question?

What does it mean to “qualify” an “expert”? To begin with, what must be qualified is not the witness (the person) on the stand as such, but, more precisely, her testimony. And this testimony must consist of specialized knowledge that is sufficiently reliable to be probative and of assistance.¹⁷¹ The specialized knowledge may be a product of her formal education, training, experience or, more likely, a combination of these factors. The issue of qualifications necessarily attaches to each and every question asked of the witness; put differently, qualification should be addressed on a question-by-question basis. Ultimately, the testimony’s assistance to the trier of fact is a function of qualifications.

A witness’s qualification to answer a question calling for specialized knowledge is a preliminary question of admissibility for the trial judge.¹⁷² On appeal this determination is given “substantial deference,” but error will be found where the trial court fails to exercise “sound discretion.”¹⁷³ There are at least three prime considerations.

First, we must distinguish between the witness as a person and her testimony. The law of evidence has long divided the world of testimony into two discrete hemispheres—that of lay and expert testimony. Each

170. WIS. STAT. § 904.02 (2003–2004) (irrelevant evidence is inadmissible).

171. See *supra* text accompanying notes 76–98.

172. WIS. STAT. § 901.04(1) (2003–2004). See *Martindale v. Ripp*, 2001 WI 113, ¶ 45, 246 Wis. 2d 67, ¶ 45, 629 N.W.2d 698, ¶ 45.

173. *Martindale*, 2001 WI 113, ¶¶ 28, 45, 246 Wis. 2d 67, ¶¶ 28, 45, 629 N.W.2d 698, ¶¶ 28, 45 (finding reversible error where the trial judge unreasonably concluded that the witness was unqualified to offer certain testimony).

hemisphere is distinct: lay testimony is a product of personal knowledge gained through the five senses and expert testimony is predicated upon specialized knowledge.¹⁷⁴ Through centuries of practice, lawyers and judges have become accustomed to the protocols of “qualifying” an expert witness. In the trial practice literature it is often presented as an exercise in eliciting the witness’s curriculum vitae through testimony about her background, education, training, and experience.¹⁷⁵ Case law clearly establishes that “a witness’s own testimony can establish the witness’s qualifications.”¹⁷⁶ The objective is to demonstrate that this is no ordinary person whose testimony must otherwise be confined to the realm of the lay witness, that is, to what she knows firsthand (most often, what she saw with her eyes). Yet despite the convenience of this legal shorthand, what must be qualified is not the witness *qua* witness but her testimony. For example, a witness who happens to be the plaintiff’s treating physician offers little more than lay opinion testimony when she testifies that the plaintiff suffered a laceration to her forehead which later turned into a scar. But when the same witness testifies that the scar will be permanent and plastic surgery will likely not erase the scar, she is now drawing upon specialized medical knowledge.

This takes us to a second point: qualifications should be approached question-by-question, not as a “field-finding.”¹⁷⁷ To be sure, the witness’s education, training, and certification in a “field” may provide a

174. The 2000 amendments to the Federal Rules of Evidence elevate the principled distinction to dogma. Federal Rule of Evidence 701 defines the permissible scope of lay opinion testimony by distinguishing it from expert testimony:

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

175. See, e.g., THOMAS A. MAUET, TRIAL TECHNIQUES 323–27 (6th ed. 2002). It is common to mark the witness’s curriculum vitae (“CV”) as an exhibit and ask her to march through her education, experience, and publications (where applicable). Opponents who blithely stipulate to the witness’s CV may encounter formidable hurdles when they later object to a witness’s qualifications.

176. *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 94, 245 Wis. 2d 772, ¶ 94, 629 N.W.2d 727, ¶ 94. The rule and practice is longstanding. See Holz, *supra* note 38, at 994 (“The fact that one is licensed may be proved by the witness’s own oral testimony.”) (collecting authority).

177. For a brief description of the older practice of “tender[ing] the witness as an expert,” see MAUET, *supra* note 175, at 327.

convenient shorthand for determining the range of her specialized knowledge. Yet the issue is never whether this witness is qualified as an expert on some subject; rather, the question is what will this witness be asked to tell the trier of fact and can she provide helpful answers? Judges, then, need not and should not make a finding about the witness's qualifications in a field such as engineering, medicine, or economics. Such field-findings are not required by evidentiary rules or case law, and are ultimately of little use. To return to the last example, a finding that the witness is a qualified medical expert does not, by itself, resolve whether she is qualified to testify about whether plastic surgery will eliminate the scar.¹⁷⁸ If opposing counsel objects that a witness is unqualified to answer a particular question, the judge will rule as to that question. Ordinarily, the ruling should be made outside the jury's presence. The federal Advisory Committee has wisely cautioned against the practice of referring to a witness as an "expert," especially by the judge:

The use of the term "expert" in [Rule 702] does not, however, mean that the jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'"¹⁷⁹

The efficacy of the question-by-question approach is best seen in *Martindale v. Ripp*, which mandates this approach.¹⁸⁰ While stopped at a traffic signal, Martindale's car was rear-ended by a "fully loaded garbage truck."¹⁸¹ The critical issue at trial was whether the collision caused Martindale's alleged jaw injury, more specifically, a temporomandibular joint ("TMJ") injury.¹⁸² At trial he presented the deposition testimony of Dr. Ryan, a board certified professor of oral

178. A family practitioner, for example, may lack the background and training in plastic surgery needed to offer a reliable opinion.

179. FED. R. EVID. 702 advisory committee's note on the 2000 amendments (citation omitted).

180. See *Martindale v. Ripp*, 2001 WI 113, ¶ 52, 246 Wis. 2d 67, ¶ 52, 629 N.W.2d 698, ¶ 52.

181. *Id.* ¶ 7, 246 Wis. 2d 67, ¶ 7, 629 N.W.2d 698, ¶ 7.

182. *Id.* ¶ 34, 246 Wis. 2d 67, ¶ 34, 629 N.W.2d 698, ¶ 34.

and maxillofacial surgery at a medical school with over thirty-related publications on the subject.¹⁸³ The trial judge permitted Dr. Ryan's opinion that the accident "caused the displacement of the discs in [Martindale's] joint."¹⁸⁴ Nonetheless, the judge later excluded Dr. Ryan's explanation about the movement of Martindale's head upon impact and how this brought about the TMJ injury:

The circuit court agreed with the City that Dr. Ryan was not qualified as an expert to give an opinion about Martindale's head and jaw movement as a result of the garbage truck striking his car from behind. . . . "[T]here was no evidence that Ryan had any knowledge as to what happened to Martindale in the collision—no knowledge of the 'mechanics' of the accident or his actual injury, or that the impact in fact caused a 'whiplash.'" The court of appeals noted that Dr. Ryan never inspected Martindale's car (or a similar model) "and knew nothing about Martindale's movements or what happened to him or the car at and after the moment of impact."¹⁸⁵

A jury found that the City's garbage truck was not the cause of Martindale's TMJ injury.¹⁸⁶

The supreme court, in a decision authored by Justice Prosser, reversed. First, the circuit court "recognized" Dr. Ryan's credentials and admitted his opinion, but then unreasonably excluded Dr. Ryan's explanation and reasoning for that very opinion.¹⁸⁷ This error denied the jury the assistance it needed and "seriously undermined the credibility of the expert's opinion."¹⁸⁸ Second, Dr. Ryan had a sufficient factual base upon which to make the opinion.¹⁸⁹ Third, the trial judge erred by finding that Dr. Ryan lacked the "qualifications to give his

183. *Id.* ¶ 37, 246 Wis. 2d 67, ¶ 37, 629 N.W.2d 698, ¶ 37 (discussing Dr. Ryan's credentials).

184. *Id.* ¶ 39, 246 Wis. 2d 67, ¶ 39, 629 N.W.2d 698, ¶ 39 (internal quotes omitted).

185. *Id.* ¶ 43, 246 Wis. 2d 67, ¶ 43, 629 N.W.2d 698, ¶ 43 (citation omitted).

186. *Id.* ¶ 35, 246 Wis. 2d 67, ¶ 35, 629 N.W.2d 698, ¶ 35.

187. *Id.* ¶ 46, 246 Wis. 2d 67, ¶ 46, 629 N.W.2d 698, ¶ 46 ("After recognizing Dr. Ryan's credentials, permitting him to testify as an expert, and allowing him to give his opinion as to the cause of Martindale's medical condition, the court denied the expert the ability to explain the 'mechanism' that prompted him to reach his conclusion. As a result, the trier of fact never received an explanation of how whiplash could lead to the stretching and tearing of ligament and the displacement of the discs that are part of the TMJs.").

188. *Id.*, 246 Wis. 2d 67, ¶ 46, 629 N.W.2d 698, ¶ 46.

189. *Id.* ¶¶ 47–50, 246 Wis. 2d 67, ¶¶ 47–50, 629 N.W.2d 698, ¶¶ 47–50.

expert opinion as to how the accident occurred.”¹⁹⁰ To the contrary, the record showed, that Dr. Ryan was well qualified to give this opinion:

[Dr. Ryan] did not present himself as an accident expert. The jury knew that he did not examine Martindale until more than three years after the accident, and he did not try to describe exactly what happened inside Martindale’s car. Instead, he was given certain facts about the accident Dr. Ryan attempted to explain “what could happen in a whiplash injury.” His testimony and the accompanying exhibit were intended to explain to the jury how Dr. Ryan believed Martindale’s whiplash-related injuries occurred.¹⁹¹

The *Martindale* court contrasted Dr. Ryan’s testimony with that of a neurologist in *Lemberger v. Koehring*,¹⁹² who stepped outside the bounds of his qualifications when he opined that a “hard hat” may have prevented the serious neurological injury suffered by the plaintiff in a construction site accident. Although well-qualified to talk about the injury and knowledgeable about “the basic laws of physics,” the neurologist “had no expertise or special knowledge on the capacity of a hard hat to withstand impact and to prevent a skull injury.”¹⁹³ *Lemberger* was “inapposite” to *Martindale* because Dr. Ryan stayed within the bounds of his specialized knowledge.¹⁹⁴ In short, “Dr. Ryan testified that the whiplash injury caused the TMJ problem, not that the accident had caused the whiplash injury”:

If Dr. Ryan had tried to testify about the speed of the garbage truck, the distances required to brake a garbage truck at a particular speed, the physics of Martindale pulling his car forward when he noticed the garbage truck bearing down on him, the significance of the garbage truck being fully loaded, the importance of a particular angle of collision, or how fast Martindale’s

190. *Id.* ¶ 51, 246 Wis. 2d 67, ¶ 51, 629 N.W.2d 698, ¶ 51.

191. *Id.* ¶ 55, 246 Wis. 2d 67, ¶ 55, 629 N.W.2d 698, ¶ 55.

192. 63 Wis. 2d 210, 216 N.W.2d 542 (1974).

193. *Martindale*, 2001 WI 113, ¶ 54, 246 Wis. 2d 67, ¶ 54, 629 N.W.2d 698, ¶ 54 (quoting *Lemberger*, 63 Wis. 2d at 217–18, 216 N.W.2d at 546).

194. *Id.* ¶ 55, 246 Wis. 2d 67, ¶ 55, 629 N.W.2d 698, ¶ 55.

head snapped backward and then forward, the issue would be different.¹⁹⁵

Fourth, the circuit court also in effect “ruled that Dr. Ryan’s expertise in oral and maxillofacial surgery did not qualify him to give his opinion about what is known as the ‘occupant kinematics’ of the accident.”¹⁹⁶ Yet here too Dr. Ryan was qualified to assist the jury:

An accident reconstruction expert or an expert in kinematics is not required for an elementary discussion of whiplash, which is the abrupt jerking motion of the head, either backward or forward. Expert testimony on kinematics is not necessary to confirm the potential for whiplash when a fully loaded garbage truck smashes into a barely moving or stopped automobile, pushing it into another vehicle, sending it 100 to 150 feet from the point of origin, and causing \$9000 in damages to the vehicle. Requiring specialized expert testimony beyond a medical expert in relatively simple automobile accident situations would escalate the cost of presenting personal injury cases without adequate justification. In short, it would present a serious issue in the administration of the legal system.¹⁹⁷

In sum, *Martindale* reveals the shortcomings of field-findings, which often obfuscate more than elucidate. To be sure, the question-by-question approach is potentially more time intensive: it compels the trial court and counsel to consider carefully the witness’s background, education, and experience in light of the factual record and the particular question before the witness—a complex task which may have to be repeated for each separate opinion question, assuming opposing counsel objects. Yet it is the surest way to assure that the trier of fact receives the assistance it deserves to decide the case in a just and rational manner.¹⁹⁸

When considering expert qualifications, the third prime consideration is how parties establish that a witness possesses specialized knowledge that may assist the court. In almost all instances,

195. *Id.* ¶ 56, 246 Wis. 2d 67, ¶ 56, 629 N.W.2d 698, ¶ 56.

196. *Id.* ¶ 61, 246 Wis. 2d 67, ¶ 61, 629 N.W.2d 698, ¶ 61.

197. *Id.* ¶ 65, 246 Wis. 2d 67, ¶ 65, 629 N.W.2d 698, ¶ 65.

198. *Id.* ¶ 68, 246 Wis. 2d 67, ¶ 68, 629 N.W.2d 698, ¶ 68.

the witness herself testifies about her background based on a résumé or curriculum vitae, which the proponent offers into evidence; diplomas and certified copies of transcripts are not required.¹⁹⁹ Further, the witness does not need to be licensed or certified even if the profession or calling requires such to practice.²⁰⁰ Section 907.02 broadly provides that the witness's specialized knowledge may be a product of her "experience, training, or education"; more simply, it may arise from her "knowledge" or "skill." For example, a medical student was found sufficiently knowledgeable to explain the content of medical records.²⁰¹ The case law provides numerous other illustrations.²⁰²

Experience-based expert testimony presents unique problems. Unlike medical doctors who can talk (endlessly) about academic achievements, degrees, certifications, and the like, some witnesses' backgrounds are rooted much more in "hands on" work (experience) than any type of formal training.²⁰³ Moreover, such a witness's qualifications may overlap with the issue of whether his testimony falls within the hemispheres of lay or expert testimony to begin with, a critical point sometimes overlooked at the trial court.²⁰⁴ Difficult as they are, these issues are entrusted to the trial judge's sound discretion as preliminary questions of admissibility. And usually the baseline will be the judge's own education, experience, and, most valuable, common

199. The rules of civil procedure may require that an expert incorporate his or her CV into the expert's (mandatory) report, or at least provide considerable detail about education, experience, etc. See BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 602-03 (2006).

200. See, e.g., *Kerkman v. Hintz*, 142 Wis. 2d 404, 423, 418 N.W.2d 795, 803 (1988) ("[O]ne who is not licensed to practice chiropractic [sic] may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given."). See also BLINKA, *supra* note 28, § 702.4 (collecting authority). With respect to physicians, the law was muddied through the 1960s until the supreme court held "that the qualification of an expert witness is not a matter of licensure but of experience." Holz, *supra* note 38, at 992-93 (discussing and collecting authority). For the opposing viewpoint see, e.g., *Bd. of Water & Sewer Comm'r v. Hunter*, No. CV-02-5952006, 2006 WL 2089914 (Ala. July 28, 2006) (finding that an engineering expert witness must be a licensed engineer). My thanks to Attorney Edward Hannan for the Alabama citation and his insight on this and so many other matters.

201. See *Hagenkord v. State*, 100 Wis. 2d 452, 463, 302 N.W.2d 421, 427 (1981) (discussed *infra* at text accompanying notes 217).

202. See, e.g., *Tanner v. Shoupe*, 228 Wis. 2d 357, 596 N.W.2d 805, 814-15 (Ct. App. 1999) (finding that proffered expert who had taught auto mechanics, including instruction on car batteries, and had worked with car batteries for over thirty years was qualified to testify on some matters (e.g., the efficacy of warnings) but not others (battery design)). See generally BLINKA, *supra* note 28, § 702.4.

203. See *Black v. Gen. Elec. Co.*, 89 Wis. 2d 195, 278 N.W.2d 224 (Ct. App. 1979). See also BLINKA, *supra* note 28, §§ 701.2, 702.4.

204. See BLINKA, *supra* note 28, § 702.4.

sense. The foundation is straightforward. Witnesses who offer experience-based expertise should be asked to describe with some specificity what they do and how long they have been doing it. An important benchmark is the closeness of the fit between what the witness does and the disputed factual issues in the case.²⁰⁵

Humility is not demanded of witnesses (or, for that matter, lawyers), yet another unique issue concerns one who asserts specialized knowledge on some questions but disclaims it as to others. For example, in *Green v. Smith & Nephew AHP, Inc.*, a lawsuit for injuries caused by latex gloves, a witness, Cacioli, “explained that he was an expert only in manufacturing processes and quality control”; he “specifically denied being an expert in the field of latex allergy.”²⁰⁶ Despite his disclaimer, “the circuit court ruled that based on his background, Cacioli was qualified to provide an expert opinion regarding the safety of various protein levels in latex gloves.”²⁰⁷ The supreme court held that this was error (albeit harmless). The record failed to establish Cacioli’s specialized knowledge regarding the effects of varying protein levels.²⁰⁸

205. As discussed in the federal case law, “fit” describes “whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)).

206. 2001 WI 109, ¶ 92, 245 Wis. 2d 772, ¶ 92, 629 N.W.2d 727, ¶ 92.

207. *Id.*, 245 Wis. 2d 772, ¶ 92, 629 N.W.2d 727, ¶ 92.

208. *Id.* ¶ 93, 245 Wis. 2d 772, ¶ 93, 629 N.W.2d 727, ¶ 93 (“To be sure, Cacioli knew of and could manipulate protein levels in latex gloves, and had some knowledge of the language and issues of the medical community that studied latex allergy. However, Cacioli was not a medical doctor, had no formal experience, training, or education in latex allergy, and had no first-hand knowledge of how or why various protein levels affected individuals. Instead, he culled his knowledge by associating with and observing medical doctors and others who had devoted their careers to the study of allergy and immunology. We cannot conclude from the fact that Cacioli seems to have acquainted himself with people qualified to testify about the effects of various protein levels in latex gloves that Cacioli was qualified to testify on this subject.”). In a concurring opinion that found no error in admitting Cacioli’s testimony, Chief Justice Abrahamson observed:

As to the first basis offered by the majority opinion, ample authority exists for the proposition that an individual may be qualified to give expert testimony based on association with and observation of professionals in a particular field. Additionally, I see no support in the case law for the majority’s conclusion that Dr. Cacioli could not testify because he “was not a medical doctor”; lacked “formal” experience, training, or education in latex allergy; and did not have “first-hand knowledge” of how latex proteins affect allergic individuals. Experience, not licensure, is the key. Expertise may be derived from experience working in a field of endeavor rather than from studies or diplomas. And Dr. Cacioli’s experience, training, and education in latex are extensive. I

The court “accord[ed] great weight to the fact that Cacioli specifically disclaimed any expertise regarding the safety of different protein levels in latex gloves” and set forth the following standard:

The circuit court must accept this foundational testimony unless “it finds the testimony not credible or there is contrary credible evidence that undercuts the proffered foundation.” . . . [W]e hold that if a witness’s own testimony can establish the witness’s qualifications, the witness’s testimony similarly might limit the witness’s qualifications.²⁰⁹

Of special importance is the caveat regarding “contrary credible evidence.” Many expert witnesses are retained by parties for the purpose of providing testimony. Particularly on cross-examination, such witnesses should not be permitted to shed tough questions, like a wet labrador shaking off water, with a terse “that’s-not-my-field” response. Ultimately, “[w]hat matters is not the witness’s view of self. Rather, what matters is whether the circuit court determines in the exercise of its discretion that the witness has the requisite experience, training, and education to qualify as an expert in a court of law.”²¹⁰ A witness’s disclaimer of expertise should normally be a matter of weight, not admissibility, and left to cross-examination and impeachment. Nonetheless, the trial judge has the power to restrict such examinations under the limited gatekeeping principle and especially where it appears that the witness’s testimony cannot assist the jury.

Finally, the signal importance of an expert’s qualifications fully justifies its status as a non-collateral subject of impeachment. The cross-examiner should be allowed wide-latitude in exploring the depth and nature of the witness’s specialized knowledge. Moreover, as a non-

am concerned that the majority’s conclusion regarding Dr. Cacioli’s qualifications raises the bar in Wisconsin regarding who is qualified to testify as an expert witness.

Id. ¶ 108, 245 Wis. 2d 772, ¶ 108, 629 N.W.2d 727, ¶ 108 (Abrahamson, C.J., concurring) (footnotes omitted).

209. *Id.* ¶ 94, 245 Wis. 2d 772, ¶ 94, 629 N.W.2d 727, ¶ 94 (majority opinion) (citations omitted).

210. *Id.* ¶ 109, 245 Wis. 2d 772, ¶ 109, 629 N.W.2d 727, ¶ 109 (Abrahamson, C.J. concurring).

collateral issue, the cross-examiner may call other witnesses (extrinsic proof) where needed to prove up the impeaching fact.²¹¹

In short, sections 901.04(1) and 907.02 compel the trial judge, upon objection, to determine whether the witness is qualified to answer a question that calls for specialized knowledge. The ruling rests firmly within the discretion of the trial judge, but it is not one that exists in isolation. Rather, the cardinal importance of the qualification element is that it provides a baseline for gauging how much assistance the witness may provide the jury. Put differently, whether the judge permits the witness to provide “more” or “less” assistance depends to a considerable extent on the witness’s level of specialized knowledge.

C. Will the Testimony Assist the Trier of Fact In Determining A Consequential Issue?

The “assistance” element is third in order for two very good reasons. First, because all evidence must be relevant, as mandated by section 904.02, relevancy should be the initial consideration. And qualifications are the second consideration because, as suggested above, they furnish the baseline for calibrating expert assistance. To put the matter more strongly, the elements of qualification and assistance relate to each other much like an algebraic function: a witness’s qualifications comprise the domain that in turn determines the range of possible assistance.²¹² And in selecting among the alternatives within this range, the judge may apply the principles of limited gatekeeping in exercising her discretion.

The assistance standard, then, compels consideration of what the witness offers by way of specialized knowledge and what help the jury may need. The judge literally controls the flow of expert information, gauging the content of the witness’s testimony on multiple factors,

211. See BLINKA *supra* note 28, §702.7. See also *Ricco v. Riva*, 2003 WI App 182, ¶ 17, 266 Wis. 2d 696, ¶ 17, 669 N.W.2d 193, ¶ 17 (holding that while the expert may have been playing “fast and loose with his qualifications,” the trial court erred by finding the witness “incredible as a matter of law” and “unqualified as a matter of law”). *Ricco* underscores that defects in qualifications generally run to the weight of the evidence, from which it follows that trial counsel must be given the full measure of evidentiary tools—wide latitude on cross-examination and extrinsic proof—in exposing them.

212. In mathematics an algebraic function “from a set X to a set Y is a correspondence that assigns to each element of X exactly one element of Y.” See Charles D. Miller & Margaret L. Lial, *Fundamentals of College Algebra* 140 (2d ed. 1986). I am using “function” in a less rigorous sense to emphasize that qualifications form the “domain” (set X) that determines the “range” (set Y) of assistance. It is the linkage between X and Y that interests me, not whether there is indeed only one Y value that corresponds with each X value.

including qualifications, the complexity of the issues, and other evidence in the case. Although no one factor is determinative and the range of assistance is virtually limitless, some generalizations may be made. Section 907.02 explicitly authorizes trial judges to determine whether expert testimony, if allowed, should be in the form of an “opinion or otherwise.”²¹³ Broadly speaking, the expert’s specialized knowledge falls into two categories: exposition and opinion.²¹⁴ Expository testimony consists of a lecture or explanation on a specialized subject such as economics, accounting, engineering, medicine, or psychology. It is teaching or instruction on a matter of general (relevant) interest without reference to the case-specific facts, as where a doctor defines the term “compressed disc” while discussing back injuries. Opinion testimony, by contrast, consists of the witness’s application of her specialized knowledge to the facts of the case, such as when our doctor also testifies that the plaintiff had “in fact” suffered a compressed disc. It is for the trial judge to determine the extent of the exposition or the sweep of the witness’s opinions, or whether the trier of fact needs any specialized assistance at all. Regardless of the witness’s qualifications then, the judge determines whether she will be permitted to testify and, if so, what the content of her testimony may be. This is the essence of the assistance standard.

Expository testimony is well-established. It is contemplated by the “or otherwise” language in section 907.02 and deeply rooted in the case law, which recognizes that expert assistance need not always take the form of opinion testimony.²¹⁵ The Wisconsin Supreme Court, drawing from the federal Advisory Committee, has itself lectured on the value of expert exposition without opinions:

“Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case,

213. Wis. Stat. § 907.02 (2003–2004).

214. See BLINKA, *supra* note 28, §§ 702.501 (exposition), 702.502 (opinion).

215. See FED. R. EVID. 702 advisory committee’s note (explaining that the 2000 (*Daubert*-induced) amendments did not “alter the venerable practice of using expert testimony to educate the fact finder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ‘fit’ the facts of the case.”).

leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference.”²¹⁶

The extent of the exposition is itself discretionary and will often turn on the witness’s qualifications. Thus, it was appropriate to permit a medical student, who happened to be in the courtroom observing a trial, to take the stand and define various terms that appeared in medical records that had been admitted into evidence. Although he lacked a medical degree (and license) and, most remarkably, had not been retained by either party, the medical student nonetheless possessed sufficient knowledge to assist the jury in understanding the hospital records.²¹⁷

Most often, however, parties retain experts precisely for the purpose of offering opinion testimony in addition to whatever exposition may be needed to explain the expert’s reasoning. And, assuming a proper objection, the trial judge faces the formidable task of deciding the scope and content of any testimony. The judge’s discretionary control over the flow of specialized knowledge—allowing none, exposition only, some opinions and reasoning—has been most frequently discussed in cases involving what may be loosely termed credibility experts. Although a detailed discussion of those cases is beyond the scope of this Article, they exhibit a creative, nuanced approach to providing assistance to juries regarding the credibility of certain classes of witnesses, chiefly victims of sexual assault, child abuse, and domestic violence who often wait before reporting crimes, sometimes convey inconsistent accounts, and occasionally recant their allegations before

216. *Hampton v. State*, 92 Wis. 2d 450, 459, 285 N.W.2d 868, 872 (1979) (quoting Sup. Ct. Order, 59 Wis. 2d R1, R207–08 (1973); accord FED. R. EVID. 702 advisory committee’s note).

217. *Hagenkord v. State*, 100 Wis. 2d 452, 463, 302 N.W.2d 421, 427 (1981). The medical student was observing the trial while on a break from classes and had absolutely no connection to the case before he testified. During a recess and upon learning of the student’s background in a chance conversation, the prosecutor called him as a witness to explain various terms in the voluminous medical records (thereby furthering the education of both the medical student and the jury). This insight comes from former circuit court judge Michael Malmstadt, who was the prosecutor who called the medical student.

trial.²¹⁸ To help better understand such puzzling conduct, the judge may permit a properly qualified expert to educate the jury about victims' reactive behavior in general without reference to the particular offense or victim (exposition).²¹⁹ Depending on the circumstances, the judge may also permit the expert to testify about the pertinent behavior exhibited by the victim in this case and even allow expert opinion testimony about whether this particular victim's behavior is "consistent" with that observed in the class of victims generally.²²⁰ Such assistance is especially useful when the opponent has relied on "widely held misconceptions about [the behavior of] sexual assault victims," for example,²²¹ a point that neatly illustrates why this must be a fact-intensive inquiry entrusted to the trial judge's sound discretion. In no event may the expert testify that the victim is "truthful" or that the "crime" occurred.²²²

Although the credibility cases arise from criminal trials, the principles are fully applicable to the wide range of expert testimony in civil litigation. *Green v. Smith & Nephew AHP, Inc.*, discussed earlier, focused on the witness's qualifications, but at bottom involved a disagreement among the justices about whether *this* witness could assist the jury.²²³ In *Tanner v. Shoupe*, the court held that an experience-based expert on car batteries was qualified to answer two of four critical issues, thus illustrating that qualifications affect the permissible range of expert assistance.²²⁴

In sum, trial judges are granted enormously broad discretion in determining whether the trier of fact may profit from expert assistance and, if so, the precise form and content of that assistance. The witness's qualifications present the range of possible assistance from which the judge will select, a discretionary determination guided by the limited gatekeeping function. The options may range from total exclusion (this

218. See BLINKA, *supra* note 28, § 608.3 (collecting and discussing cases).

219. See *State v. Robinson*, 146 Wis. 2d 315, 333, 431 N.W.2d 165, 172 (1988).

220. See *State v. Jensen*, 147 Wis. 2d 240, 256–57, 432 N.W.2d 913, 920 (1988).

221. *Robinson*, 146 Wis. 2d at 335, 431 N.W.2d at 173.

222. See *State v. Tutlewski*, 231 Wis. 2d 379, 389, 605 N.W.2d 561, 566 (Ct. App. 1999).

223. See *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 190, 245 Wis. 2d 772, 629 N.W.2d 727. See *supra* text accompanying note 206–09. The concurring opinion would have found no error in the admission of the expert's testimony, which the majority found harmless in any event.

224. 228 Wis. 2d 351, 369–75, 596 N.W.2d 805, 813–15 (Ct. App. 1999) (holding that the trial court reasonably excluded opinion testimony regarding battery design and what caused the battery to explode, but the witness should have been permitted to testify about issues involving a "vent cap" and the inadequacy of warnings on the battery).

witness has nothing to add) to exposition or opinion testimony. And in making this determination, the trial judge will be immeasurably assisted by lawyers who understand the case far better than the judge and who use thoughtful objections and offers of proof to craft reasonable alternatives.

VII. RETUNING THE RELEVANCY TEST: SOME SUGGESTIONS

The prevailing relevancy test has successfully governed the admissibility of expert testimony for decades. It is a rule that manifests great trust in the adversary trial and the skill and ability of trial lawyers to elucidate the strengths and weaknesses of expert testimony for the trier of fact. The appellate cases have revealed no intractable problems that warrant a sea change in Wisconsin evidence law, particularly the adoption of the federal reliability standard. And it is noteworthy, if not ironic, that despite the blame traditionally assigned, like a medieval witch's mark, to the personal injury plaintiff's bar for unloading "junk science" into the courtroom, the most troublesome Wisconsin appellate cases have involved criminal cases and a defendant's use of expert evidence in a civil case.²²⁵ Nor has there been any careful study of trial court decision making that points to insuperable problems with present policy.

Moreover, the federal reliability test is fundamentally flawed. First, the standard itself is unstable and difficult to apply, which has resulted in inconsistent, sometimes capricious decisions.²²⁶ Second, what seemingly attracts its champions, despite the test's shortcomings, is that the federal reliability standard has become a formidable "case-dispositive" tool, or perhaps weapon, at the summary judgment stage. Put differently, parties use the rule in conjunction with summary judgment motions to exclude expert testimony that is otherwise needed to prove a prima facie case. The attraction is not simply the capricious nature of Rule 702 reliability rulings (Why not take a chance, maybe we'll prevail?), but the great deference accorded evidentiary rulings, as distinct from the summary judgment ruling itself, on appeal. Most importantly, unlike trial where the Q&A is oral and counsel must identify and frame objections in scant seconds (or less), pretrial motion

225. See *supra* text accompanying notes 157–67. See *Bittner v. Am. Honda Motor Co.*, 194 Wis. 2d 122, 533 N.W.2d 476 (1995); *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980). My criteria for "troublesome" is the courts' determination that the expert evidence in a case was essentially irrelevant and completely unhelpful to the trier of fact.

226. See *supra* text accompanying notes 56–66.

practice permits lawyers to spend weeks poring over opposing experts' reports and depositions like medieval glossators. Careful, elaborate objections are composed in writing with a precision unthinkable during trial. Enormous burdens and unrealistic expectations are placed on trial judges. The strategy then is simple: use Rule 702 to exclude the opposition's critical expert testimony and then demand summary judgment.

To be sure, summary judgment motions are paired with evidentiary motions in limine in Wisconsin state practice, but with a critical difference. Disputes about the reliability of an expert's principles or methods are seldom case-dispositive at the summary judgment stage; rather, they will ordinarily be resolved by the jury unless the trial judge finds reason to exclude or limit the testimony in accordance with the relevancy rule and the limited gatekeeping principle. And here the focus is where it should be, namely, does the expert's testimony assist the trier of fact in resolving consequential issues? The judge then is not forced into the quagmire of resolving scientific or other technical disputes among qualified experts and about which the judge likely knows little.²²⁷

227. Although these musings about *Daubert* and summary judgment are beyond the scope of this Article, several points are pertinent. First, the Supreme Court's trilogy of expert cases—*Daubert*, *General Electric v. Joiner*, and *Kumho Tire*—were all summary judgment cases. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997). Second, commentators have also observed that evidentiary rulings have increased the number of summary judgment adjudications. See GIANNELLI, *supra* note 8, § 24.04[4]. The North Carolina Supreme Court expressed “concern[] with the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed.” *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 691 (N.C. 2004) (collecting authority). It further explained:

Procedurally, this imbalance may be explained because trial courts apply different evidentiary standards when ruling on motions to exclude expert testimony and motions for summary judgment. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party. Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact.

Not so in the case of preliminary motions to exclude expert testimony under *Daubert*, which are resolved under Rule of Evidence 104(a). Here, trial courts are not bound by the rules of evidence, are not required to

This is not to say, however, that the relevancy test is flawless or has remained unchanged. Although Wisconsin courts remain steadfastly supportive of the relevancy approach, at least in its broad outlines, the standard has been both enriched and subtly changed in the course of a continuing dialogue over alternative rules, especially the federal reliability standard and the *Frye* test. For this reason, it is more accurate to say that the relevancy test has been retuned. A wholesale revision, to repeat, is simply not warranted by our decades of experience with the relevancy test. Yet the increasing use of expert testimony on a broad range of issues has surfaced palpable concerns that it is sometimes unreasonably time-consuming, confusing, and unfairly prejudicial. Wisconsin case law has staked itself to a middle ground that is somewhere between the extremes of a laissez-faire “free proof” (let it all go to weight) approach and the capriciously rigid federal reliability standard.

Wisconsin case law provides trial courts with broad discretionary tools for regulating and limiting expert testimony while remaining faithful to an assistance standard that values informed fact finding. An outline for analyzing the admissibility of expert testimony is apparent; the analytic framework is not, however, something that judges are expected to apply *sua sponte* whenever a party proffers expert testimony. Rather, it is trial counsel’s role to make timely objections based on pretrial discovery and a mastery of facts and strategy that the trial judge simply cannot possess. The proponent’s response should offer a theory of admissibility that responds to the opponent’s specific

view the evidence in a light favorable to the non-movant, and may preliminarily resolve conflicting issues of fact relevant to the *Daubert* admissibility ruling. N.C.G.S. § 8C-1, Rule 104(a). Taking advantage of these procedural differences, a party may use a *Daubert* hearing to exclude an opponent’s expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment. By contrast, a party who directly moves for summary judgment without a preliminary *Daubert* determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment.

Id. at 692 (citations omitted). The court’s ultimate concern was that the “sweeping pre-trial ‘gatekeeping’ authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.” *Id.* Echoing an argument that applies in Wisconsin as well, the North Carolina approach was not “in need of repair” and, in any event, offered a rule that was more “flexible” and “workable” than the federal approach. *See id.* at 692–93.

objection. In short, the considerations described below are points of engagement for counsel, not a blueprint.

First, the trial judge should determine whether the expert's testimony is relevant, a consideration that embraces both the definition of relevancy under section 904.01 and the issue of authentication under section 909.01.²²⁸ Objections that the expert's reasoning, methods, or tests, including their application, are unsound, speculative, or uncertain normally raise issues of conditional relevancy. The trial judge must determine whether a jury, acting reasonably, could find the expert's reasoning and methods reliable.²²⁹ The conditional relevancy doctrine, it is contended, provides a more than adequate firewall against "junk" experts without imposing the burdens associated with the federal rule. Nonetheless, the various *Daubert* "factors" (e.g., peer reviewed? developed for litigation?²³⁰) may inform the analysis under the wide umbrella of conditional relevancy, which asks only whether a reasonable jury could find the testimony reliable. One may anticipate that expert testimony will only rarely fail conditional relevancy scrutiny if only because seasoned trial lawyers will seldom offer evidence so lacking in probative force (especially such expensive evidence). And even when they fail, such challenges may bring to light the marginal probative value of proffered expert testimony and the attendant risks—such as unfair prejudice or confusion—it creates, which may, in turn, inform whether it will assist the trier of fact and the judge's ruling as limited gatekeeper. Section 904.01, the definition of relevancy, will most often be implicated where the objection is that the expert's testimony, whether by exposition or opinion, has no bearing on the facts of consequence.²³¹

Second, the witness must be shown to have specialized knowledge based on education, training, or experience.²³² This is a preliminary question of admissibility for the trial judge that should be approached on a question-by-question basis; "field" findings are neither necessary nor particularly helpful. In any event, the jury need not, and should not, be informed of the judge's finding about the witness's qualifications. Finally, weaknesses, limitations, or defects in the witness's qualifications are a non-collateral issue for impeachment purposes. Wide-latitude on

228. *See supra* text accompanying notes 149–70.

229. *See supra* text accompanying notes 76–98.

230. *See supra* text accompanying notes 46–55.

231. Unlike the "shared governance" of conditional relevancy, a determination of relevancy under section 904.01 is a preliminary question of admissibility for the judge alone.

232. *See supra* text accompanying notes 171–211.

cross-examination, along with extrinsic evidence where needed, should be permitted.

The nature and depth of the witness's specialized knowledge is critical to the third element: What assistance may this witness provide the trier of fact? It is contended that qualifications and assistance are paired in a functional relationship.²³³ Qualifications (the domain) will determine the range of potential expert assistance. And it is in the judge's capacity as limited gatekeeper that he or she will determine what form that assistance may take: (1) no testimony; (2) exposition alone; or (3) various opinions. In exercising this discretion the judge may consider the section 904.03 balancing test, which excludes evidence where its probative value is substantially outweighed by unfair prejudice or confusion of the issues. Yet section 907.02's assistance standard provides an independent, more free-ranging grant of discretion that assesses the testimony's probative value against other factors, including whether it is superfluous, confusing, or a waste of time. Here there is no bias in favor of admissibility. Rather, the trial court may shape the form and content of the expert's testimony to assure it provides assistance while respecting those other concerns.

Finally, it cannot be gainsaid that the relevancy test demands active, engaged trial lawyers who can assist the court in working through these issues. Absent an objection, of course, the expert's testimony is admissible and the jury is free to give it whatever weight it deems appropriate. Discovery procedures provide ample avenues for discovering an expert's opinions, bases, and reasoning.²³⁴ Trial counsel will seldom be caught without adequate notice of what the opponent's expert may say. Limited gatekeeping, particularly the assistance determination, may often be enhanced by motions in limine that educate the judge about both potential objections and theories of admissibility. Unlike the federal rule, where the court's energies are usually employed in the name of avoiding trials through summary judgment, the relevancy rule's focus is how to better educate the trier of fact at trial.

233. See *supra* text accompanying notes 212–24.

234. See, e.g., WIS. STATS. §§ 804.01(2)(d), 971.23(1)(e), (2m)(am) (2003–2004).