☞ **95hr_AC-ISCP_Misc_pt11a**

☞ Details: AB11 and SB118, relating to comparative negligence and punitive damages

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1995-96
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance, Securities and Corporate Policy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (October 2012)

6104 Rainbow Lane
Wausau, WI 54401
January 16, 1994

Rep. Sheryl Albers
S6896 Seeley Creek Rd.
Loganville, WI 53943

Re: Proposed cap on non-economic losses in malpractice cases

Dear Rep. Albers:

Recently I learned that debate is to begin soon about limiting non-economic awards in medical malpractice cases. I am a podiatrist and certainly have an interest in such legislation. However, I suggest that tort reform should take a look at the larger picture, and that such reforms should apply to society as a whole.

Enclosed is a proposal I drafted last year in response to a lawsuit pressed in Marathon county by a young man who had been shot by police after he first shot at them. He was intoxicated at the time. In my opinion, he was lucky to be alive. If the police had been following training guidelines, they would not have shot to wound him as they did; they would have shot to stop him quickly, which would have likely resulted in mortal wounds. In other words, by showing compassion, the police (and county taxpayers) were sued.

Rule 11

The proposal I have enclosed would address the problem of frivolous lawsuits. The problem with the current proposal is that it only limits what plaintiffs can collect if they prevail in a case. It does nothing to chastise plaintiffs who initiate bogus cases. Estimates of unmerited medical malpractice claims run as high as 60%. Yet there is very little real disincentive in filing such suits. Many of them end up getting settled out of court for ``nuisance value'' instead of being defended, because even in winning, the defense loses monetarily because of the legal costs, so a settlement is made for less than that cost.

What is proposed here goes beyond the concept of ``loser pays''. It is a proposal to establish real equity in our tort system. For too long plaintiffs and their attorneys have used our constitution and legal process as their own private economic playground. This is a proposal to make things equal. I hope it will be of interest.

Thanks for your consideration.

Sincerely,

Joe Gelling

W. Joseph Gelling

Proposal for Tort Reform

The following is a proposed statute for establishing equity in the civil tort litigation process.

I. In all cases involving litigation for monetary damages claimed by a plaintiff, the jury deciding the dispute shall be empowered, and shall be so instructed both at the beginning of the trial and just prior to deliberation, to determine the merits of the case and the following:

a. Whether or not the plaintiff has been wronged by the defendant and is entitled to monetary damages from the defendant, and what amount such damages should be, based on evidence presented by the plaintiff. Consideration of such damages shall include, but not be limited to, reasonable attorney fees incurred by the plaintiff.

b. Whether or not the defendant has been wronged by the plaintiff by prosecution of an unwarranted or frivolous suit and is entitled to monetary damages from the plaintiff, and what amount such damages should be, based on evidence presented by the defendant. Consideration of such damages shall include, but not be limited to, reasonable attorney fees incurred by the defendant.

c. Whether or not there is liability on the part of the defendant for a wrongful act against the plaintiff, or liability on the part of the plaintiff against the defendant for a wrongful suit, and if neither exists to determine that no monetary damages are due to either the plaintiff or the defendant.

II. In those cases in which a finding is made in favor of the defendant, and monetary damages are awarded to the defendant against the plaintiff, counsel for the plaintiff shall be assessed one third of that amount. The remaining two thirds shall be the responsibility of the plaintiff.

III. Any person (or persons as part of a larger entity) against whom monetary damages have been assessed as plaintiff(s) in any civil suit, shall not be eligible to file any other civil suit against any previously involved defendant or any other person(s) or other entity, until such time as full monetary assessment has been paid to settle judgement. Any other civil suits filed by such plaintiff or plaintiffs, whether individually or severally, pending at the time of an adverse judgement against such plaintiff(s) shall be immediately held in abeyance. Any civil suit held in abeyance for more than one year shall be dismissed. There shall be no time limitation after which an adversely adjudged plaintiff shall be able to file a subsequent civil suit without first satisfying full payment of monetary damages from prior adverse judgement.

Comments about provisions of the proposal

I. a. The same function the jury has always had would still exist.

I. b. By allowing a defendant the right to recover damages, a stronger defense against frivolous claims would be encouraged. There would be less settlement out of court for ``nuisance value". More defendants who feel they are innocent of wrongdoing would likely defend themselves.

I. c. Juries would still have the option to find that the weight of evidence favors a defendant without penalizing the plaintiff unless a clear determination of frivlous or malicious prosecution can be established.

II. There is precedent for holding attorneys accountable for going along with a frivlous tort action. The first case of which this writer is aware is Steinberg v. St. Regis/Sheraton Hotel, No. 82 Civ. 6630, U.S. District Court for Southern New York, March 30, 1984. In this case two plaintiffs and their attorney were all fined $10,000 each for being party to a frivolous suit. This provision would encourage reasoned evaluation of the merits of a case and eliminate some (perhaps much) of the ``ambulance chasing" that pesters American civil courts.

III. Access to the justice system is a constitutional right. But no constitutional right is absolute. Every such right must be exercised judiciously.

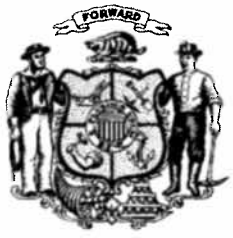
The right to free speech is protected only so far as statements that might harm a particular individual or entity must be truthful or be within limitations of expression of opinion. Blantantly false, malicious statements can subject the speaker to charges of slander for which he/she can be found libel for monetary damages.

The much debated right to bear firearms does not entitle a private citizen to possess fully automatic weapons or weapons of mass destruction such as bombs or artillery.

A big cost to many states is the expense of defending against the shenanigans of ``jailhouse lawyer" inmates who file dozens of frivolous lawsuits against the state or individuals randomly. With this proposal in effect, the complainant would be locked out after one phony proceeding, as it is unlikely that the condition of payment for an adverse prosection finding could be met. While this does not solve the whole problem, it would handle repeat offenders.

Voting is a constitutional right, yet convicted felons are legally deprived of doing so. With this as an example it is difficult to imagine how any court reviewing this provision of the proposal would not let it stand. It merely makes an individual responsible for his/her mischief.


WISCONSIN STATE LEGISLATURE


FORWARD

PREPARED REMARKS OF JAMES W. MOHR, JR.

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Hartford, Wisconsin 53027-0032
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JOINT AND SEVERAL LIABILITY
1995 Senate Bill 11

February 1, 1995

My name is James W. Mohr, Jr. I am an attorney at law with Mohr & Anderson, S.C. which has offices in Hartford and Madison, Wisconsin. I am a former president of the Civil Trial Counsel of Wisconsin. The CTCW is a statewide organization of over 500 trial attorneys whose practices consist primarily of the defense of Wisconsin citizens and businesses in civil litigation in the courts of our state.

Over the years you have undoubtedly heard the testimony of many "trial attorneys" who have appeared before you as representatives of the Wisconsin Academy of Trial Lawyers. You should understand, of course, that this is a group of attorneys who represent claimants in civil actions for damages, and are paid by a percentage of the recovery. Their perspective, obviously, is the maintenance and encouragement of a system that allows maximum recovery to these claimants. Their fees, and their standard of living, is based upon a percentage of this recovery -- customarily known as the "contingent fee."

The CTCW, on the other hand, is made up of attorneys who usually represent the people who pay these claimants and lawyers. Very often this is an insurance company, but in many significant cases it can be a private business, a partnership, a homeowner or an automobile driver. In short, we represent people like you and me who ultimately bear these expenses.

I am speaking as a concerned citizen and trial lawyer. I support Senate Bill 11 which will abolish the concept of joint a several liability. The trial lawyers who make up our statewide organization were surveyed on this question several years ago, and 73% of the responses indicated that our members supported an abolition in the present doctrine of joint and several liability to limit a defendant's responsibility to its own percentage of negligence. While certainly not unanimous, this response constitutes a significant consensus from those attorneys who regularly engage in the defense of these claims.

Attached to these prepared remarks is an article I authored last year in support of a very similar bill (Senate Bill 152); I ask that you please read it. Also attached is a proposal revision to Senate Bill 11 which I request you consider as an amendment since I feel it clarifies the intended purpose of the legislation.

What is the doctrine of joint and several liability? Stated very simply, it means that a defendant, whose actions or inactions may have been a cause (regardless of how small) of injuries to a plaintiff, can be held legally responsible for all of the plaintiff's damages.

To use a more concrete example, suppose that a manufacturer sells a machine with a guard on it which protects operators of the machine from injury caused by moving parts underneath the guard. Further assume that the guard is removable only to allow servicing of those moving parts, but is clearly labelled that the machine should never be operated without the guard in place. Finally, assume that the owner of the company which purchased the machine tells a worker to ignore the warning, remove the guard, and operate the machine without it. The worker then injures himself severely and sues for one million in damages. The case goes to trial and the jury decides that the employer is 99% responsible for the plaintiff's million-dollar injuries because it told the plaintiff to remove the guard; but the jury, out of sympathy for the plaintiff, also agrees with his attorney that the manufacturer should have designed a guard that

was impossible to remove (notwithstanding the clear warnings and the obvious danger) and assesses 1% responsibility on the manufacturer. In this scenario, the injured plaintiff is prohibited from recovering his million dollars from his employer (because his exclusive remedy against the employer is the Worker's Compensation Law) but the manufacturer is legally required to pay one million dollars in damages to the plaintiff.

Let's take another example. Suppose you are driving your automobile late one night and see headlights approaching from a car travelling in the opposite direction. Suddenly, and without warning, the car turns in front of you. You immediately slam on your brakes, but are unable to stop in time to avoid hitting the side of the car, killing two of the passengers inside. The driver of the oncoming car has no insurance, and may even be legally drunk. However, if the plaintiffs' attorney is able to convince the jury, whether out of sympathy for his dead clients or their families, that you somehow could have stopped just a little sooner or anticipated earlier that this would happen, and are therefore 1% responsible for the accident, you could be personally liable for the millions of dollars to compensate the claims of the passengers.

Does this sound like a rational system? Does it sound like a fair system? If you were given the task of designing a legal system from scratch would you make defendants pay more than their fair share of the responsibility for an accident? If a defendant is only 1% responsible for a plaintiff's injuries, isn't it rational to suggest he should only pay 1% of those damages?

The foregoing examples are not remote or speculative. We see them every day as defense trial attorneys. The possibility of a 1% verdict, coupled with extraordinarily high damages, operates as a form of legal extortion to force many insurance companies, manufacturers or other businesses and individuals to settle cases for fear of the substantial monetary risk should they be found even 1% negligent.

The inevitable counterargument presented by contingent-fee lawyers is: Why should an innocent plaintiff suffer under these circumstances and not be able to recover the full measure of his or her damages? If you accept this argument, it necessarily follows that you believe in a system where all injured persons who are not at fault should be paid in full regardless of the fault of any individual defendant. There is nothing inherently wrong with such a philosophy, but it should be recognized for what it is: As system of socialized recovery for victims of accidents. If we, as a state or a society, want to adopt the philosophy that anyone who is innocently injured should recover in full for their damages, then there is a far simpler and more efficient way of accomplishing this. Our system of Worker's Compensation (which was pioneered in Wisconsin) provides full compensation to all injured persons without the necessity of involving lawyers. It further insures that everyone (not just those people fortunate enough to have the right lawyer) receives compensation for their injury. With legal fees eating up 40-50% of the recovery, it is easy to see that if we adopt a statutory system of socialized recovery for victims of accidents, it means that far more money will get to far more innocent victims at far less administrative expense.

However, if we want to continue our present system which is based on fault, (that is, only those who are at fault pay for the damages which they caused), then it is only just, fair and rational that we abolish or modify the doctrine of joint and several liability in Wisconsin to provide that people who cause accident or injury are legally responsible for only that percentage of damage that they have caused. It is neither rational, fair, nor economically sensible to impose a full and enormous responsibility on essentially innocent people and companies.

I urge your support for and passage of Senate Bill 11.

Restoring Rationality

by James W. Mohr, Jr.

Public perception of lawyers and of the fairness of our legal system is not a cause for excessive pride. Jokes and criticisms about attorneys have never been more prevalent, and in many cases are well-deserved. Some bar leaders respond by attacking the critics, but fail to examine the root causes for the dissatisfaction. One of the most persistent sources of criticism is an image of greedy lawyers filing frivolous and unnecessary lawsuits in an attempt to pick the deep pockets of marginally or non-liable parties.

The Wisconsin Coalition for Civil Justice recently commissioned Public Opinion Strategies to conduct a survey to determine voters' attitudes of the Wisconsin civil justice system. This statewide survey was based on responses of individuals selected randomly from voter registration lists, and had a margin of error plus or minus 4.28 percent. Eight in ten of those voters considered lawsuit abuse to be a serious problem in Wisconsin. Forty-three percent believed it to be a very serious problem!

One of the principal reasons for this dissatisfaction is the doctrine of "joint and several liability." This doctrine in Wisconsin means that a defendant which may only be 1 percent responsible for an accident or injury is nevertheless required to pay 100 percent of the damages. Wisconsin courts have for many years thus held each responsible defendant both "jointly and severally liable" to an injured plaintiff.

The practical effect of this doctrine is that plaintiff's contingent-fee attorneys start lawsuits against defendants who are not realistically liable for an accident or injury; but, if the potential damages are high enough the defendant cannot afford the economic risks associated with a finding of 1 percent liability.

Thirty-seven states have eliminated, modified or never had this system of joint and several liability. Wisconsin is one of only seven states that have not addressed the issue of eliminating or modifying this doctrine. In the past, bills have been introduced into our legislature for this purpose, but key legislators in both houses have been able to bury the bills in committee without even giving them public debate.

That situation may be ending as Senate Bill 152 works its way through the current session of the Wisconsin Legislature. Introduced by Senator Joanne Huelsman of Waukesha, and with bipartisan support in both houses, it has passed the Senate and is now in an Assembly committee. Contingent-fee attorneys (who reap significant financial benefit from the current system) are desperately lobbying to keep it bottled up in that committee and prevent it from being debated on the floor of the Assembly. If it should receive a floor debate, it is expected that the bill would pass, so one can understand their concern. Many trial attorneys who, like me, defend Wisconsin citizens and businesses against these marginal claims support the bill.

The doctrine of joint and several liability has outlived its usefulness. It is a product of an antiquated era in our legal system. At common law, it was extremely difficult to join two or more defendants in a suit, unless they specifically acted in conspiracy or under a joint agreement. As a result, the doctrine emerged which made one defendant responsible for all damages, to avoid penalizing a plaintiff who could not join all responsible defendants in a single action. Modern rules of judicial procedure however now allow free joinder of all defendants who are even partially responsible, so the doctrine of joint liability is no longer necessary.

Additionally, joint liability was predicated on the inability of early courts to apportion the relative negligence or fault among several defendants. This language from an 1898 decision of the Wisconsin Supreme Court (Cook v. Minneapolis and St. Paul Railroad, 98 W. 624) is typical:

> ". . . [W]here two cases, each attributable to the negligence of a responsible person, concur in producing an injury to another . . . it is reasonable to say that there is joint and several liability, because . . . for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole." [Emphasis supplied.]

Wisconsin law has changed significantly since that was written. Wisconsin injuries and courts now routinely apportion negligence or fault among numerous defendants. It is now not only easy, but routine, to determine precisely what percentage or portion of a plaintiff's damages are caused by each individual defendant. There is, therefore, no longer any reason to make a defendant responsible for more damage than it has caused.

Further, it is simply neither rational nor economically justifiable to make the one defendant with the deepest pockets responsible for paying damages attributable to every other defendant. This is precisely what the Supreme Court of Oklahoma concluded in a recent decision entitled Laubach v. Morgan, 588 P.2d 1071 (1978):

> "Historically, if the negligence of two or more tortfeasors caused a single and indivisible injury, the concurrent tortfeasors would be liable 'in solidium,' each being liable for the total amount of the award, regardless of his percentage of responsibility. Each defendant was jointly and severally liable for the entire amount of damages. This principle of entire liability is of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party." At 1073-1074.

Oklahoma, along with a number of other states, abolished the system of joint liability and held that a plaintiff could collect from a defendant only that portion of damages caused by the defendant.

Plaintiffs' attorneys wish to preserve the current system because it makes recovery from the richest defendant comparatively easy. It thus facilitates payment to them of one-third of any recovery. They clothe the economic windfall which they receive in the sympathetic argument that to do otherwise would unfairly deprive an injured plaintiff of damages necessary to fully compensate them.

By doing so these attorneys fail to recognize the gross unfairness to any of us who may be a defendant to bear the burden of paying all damages, totally out of proportion to our fault. This burden always falls upon the defendant who is most successful or was prudent enough to purchase adequate insurance. Our current system rewards that success or prudence by imposing on them the obligation to pay the full financial losses caused by irresponsible defendants. Such a philosophy hardly encourages success.

What these contingent-fee lawyers do not wish to acknowledge is that if there is a problem compensating persons injured by irresponsible or uncollectable defendants, it is a societal problem. It is not a problem that should be borne solely by the financially prudent.

Wisconsin was a national leader a century ago when it established a workers' compensation program that required payments to injured workers regardless of who was at fault. It was a recognition by our society that people who were injured while at work should be compensated for their medical bills and damages without having to argue comparative negligence. If, as a society, we are again saying that persons who are injured other than at work would be compensated for their medical bills and damages, it is far more rational and efficient to set up a similar system of compensation, which allocated the costs evenly across society.

Such a system would not impose an unnecessary and unfair burden on the marginally responsible, but financially prudent, defendant. It would also take the plaintiffs' attorneys (and their costs-plus-contingent-fee-recovery) out of the loop and deliver more benefits to the injured person where it rightfully belongs.

Senate Bill 152, if allowed out of committee for a floor debate and passage, might be a step in that direction. It would certainly restore rationality and fairness to our justice system, and perhaps even improve the public's perception of that system and of its attorneys. Unfortunately, the contingent-fee attorneys have been unusually effective in preventing this reform.

About the Author

James W. Mohr, Jr. is a 1972 graduate of Harvard Law School and president of his firm, Mohr Anderson & McClurg, S.C., located in Hartford, Wisconsin. Mr. Mohr has been a past president of the Civil Trial Counsel of Wisconsin, the statewide organization of attorneys who defend Wisconsin citizens and businesses against civil lawsuits. He is a member of the International Association of Defense Counsel, and the Defense Research Institute which awarded him its Exceptional Performance Citation in 1990 as well as its Fred Sievert Award as Outstanding Defense Bar Leader in the Nation.

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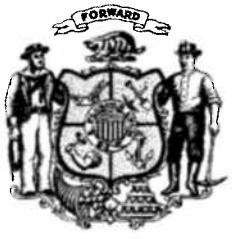
PROPOSED AMENDMENT TO SENATE BILL 11, §895.045(1), LINES 10-12

10 The liability of each party

11 found to be causally negligent for damages is limited to that percentage of damages equivalent

12 to the percentage of the total causal negligence attributed to that party.

WISCONSIN STATE LEGISLATURE



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REPRESENTING WISCONSIN BUSINESS
Wisconsin Manufacturers & Commerce

Wisconsin Manufacturers Association — 1911
Wisconsin Council of Safety — 1923
Wisconsin State Chamber of Commerce — 1929

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Vice President
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TO: **Members of the Wisconsin Assembly**

FROM: **Nick George, WMC - Director of Government Relations**

DATE: **March 30, 1995**

RE: **Senate Bill 11 -- Joint and Several Liability**

Wisconsin Manufacturers & Commerce (WMC) Supports Senate Bill 11, as amended by the Senate, which modifies the system of joint and several liability and strengthens the standard for awarding punitive damages.

For the last ten years the business community has identified the modification of joint and several liability as being the most effective way in which to eliminate abuses that have developed in our civil justice system. Those abuses include filing lawsuits against almost any entity in hopes of finding the "deep pocket". Deep pockets are usually businesses with the insurance and resources to compensate the victim. Often the connection between the victim and the defendant is tenuous at best.

Attachment I: Attached is a summary of some of the letters received by WMC over the last two months on the subject of lawsuit abuse. As you can see, being named in a frivolous lawsuit where there is only a marginal, if any, connection to the actual harm is an all too common experience in Wisconsin. The letters speak for themselves however note that nowhere do the authors ask to be indemnified for their actions. Only that there be a substantive reason for being named in a lawsuit and that they be held responsible for the percentage of negligence assigned them by the jury and no more.

Attachment II: The concept of joint and several liability remains a mystery for many not involved in the mechanics of our tort system. The mystery surrounding joint and several has hindered reform efforts. The attachment titled "Commonly Asked Questions on Tort Reform" highlights the problems that have developed as our tort system has evolved and argues that the current system creates a second victim.

SB 11 also strengthens the standards for awarding punitive damages. Historically, punitive damages were only awarded when defendants intentionally harmed a victim. In time the standards changed so that a plaintiff no longer must prove the defendant acted in a malicious or intentional manner. SB 11 restores the standards to their original intent.

SB 11 ensures victims have access to the courts without encouraging irresponsible victims and lawyers to file frivolous suits in search of the deepest pocket. Defendants will be held accountable for their percentage of damages and no more if less than 51% at fault. In this way a second victim will not be created in an effort to compensate the first. **Senate Bill 11 restores rationality and fairness to Wisconsin's tort system. We urge your support of Senate Substitute Amendment 1 to Senate Bill 11.**

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Madison, WI 53701-0352
Phone: (608) 258-3400
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W.D. Hoard & Sons Company, Fort Atkinson

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Lindsay, Stone & Briggs Advertising, Inc., Madison

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American Family Mutual Insurance Company, Madison

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GM Corp., North American Truck Group, Janesville

GWEN NICKLESKI, Site Manager
3M Company, Menomonie

JOHN A. NOER, President & CEO
Northern States Power Company, Eau Claire

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JUDE M. WERRA, President
Jude M. Werra and Associates, Brookfield

COMMONLY ASKED QUESTIONS ON

Tort Reform

Joint and Several Liability

Below are some of the most commonly asked questions regarding Wisconsin's system of joint and several liability. If you have further questions, please feel free to contact members of the Wisconsin Coalition for Civil Justice.

Wisconsin Coalition for Civil Justice
Post Office Box 352
Madison, WI 53701-0352
608/258-3400

What is joint and several liability?

Joint and several liability was originally adopted from English law and applied to two or more parties found guilty of conspiring to commit a wrongful act that resulted in an injury. The guilty parties as a group were held liable for total damages. However, because it was considered impossible to divide responsibility for concerted action, any one defendant could be made to pay the total damages if the others were unable.

This concept has since evolved to apply in any civil damage case involving multiple defendants, *even where there is no conspiracy and no intent to do wrong.*

Why do members of the Wisconsin Coalition for Civil Justice want to change the system of joint and several liability as it is now applied?

Joint and several liability can force parties who had a minimal role in causing an injury to be held liable for up to 100% of the damages awarded in a jury trial, simply because they are most able to pay. The fear of being held responsible for 100% of the damages awarded has created numerous out-of-court settlements by defendants against whom the lawsuit is often questionable. These conditions, in turn, provide a powerful incentive for attorneys and plaintiffs to sue.

Does joint and several liability help deter negligent behavior?

No. Instead, all too often, joint and several liability deflects the cost of another's negligent behavior to the wrong parties. In Wisconsin, some entities are immune from liability by law. Others are immune because they are either uninsured, under-insured, bankrupt or indigent. When these are the primary wrong doers in a civil lawsuit, the defendant least negligent can be made to pay for the acts of the wrong doers. Thus, joint and several liability does not discourage negligent behavior. Instead, it discourages innocent parties from seeking to prove their innocence in court for fear of being held 100% liable.

Are there many cases where joint and several liability resulted in the wrong parties paying?

Yes. However, very few of them make it to court. The concept, as applied today, literally deters defendants from taking a case all the way to trial. It is estimated that over 90% are settled out of court, where the threat of having to pay full damages and legal defense costs is used as intimidating leverage in negotiations. Because of the sheer number of out-of-court settlements, the scope of the problem remains largely hidden.

Why does the scope of the problem remain hidden?

While some corporations and insurance companies aggressively defend lawsuits to prove their innocence, regardless of legal expense or verdict risk, others settle the same type of lawsuits just to avoid the high cost of defending a lawsuit or the deep pocket result. Either choice is a business decision that represents the consideration of many factors. One of the downsides to an out-of-court settlement is that the company can be viewed as an easy mark for settlement money. As a consequence, such companies are reluctant to disclose their settlement histories.

Personal injury lawyers, on the other hand, are reluctant to disclose out-of-court settlements in the context of tort reform lest they reveal how the system really works, thereby jeopardizing a lucrative

source of income. That is why personal injury lawyers demand settlement statistics from proponents of change, knowing full well that the risks associated with such disclosure. Meanwhile, the personal injury lawyers possess the very information that proves the tremendous impact joint and several liability has on a settlement.

How much money does a personal injury lawyer get for a successful lawsuit or settlement?

Usually, 33-40% of a plaintiff's award or settlement, plus expenses.

Who is hurt by joint and several liability as it is applied today?

Everyone. As liability lawsuits have increased and damage settlements have risen, the costs of avoiding liability have grown. Those costs show up everywhere, including in higher prices for products, higher taxes and higher insurance premiums. But those aren't the only costs. Many beneficial products never make it to market for fear of liability exposure. Many products are not improved for fear that improvement is a sign that the product was first manufactured defectively. Another cost also shows up in the number of jobs lost because products were not made or discontinued.

If joint and several liability is eliminated, how will victims be compensated?

Presently, not all victims are compensated. Only those victims in accidents that can find a defendant or a number of defendants at fault are compensated through our civil justice system. Literally, thousands of accidents occur daily where there is no defendant involved to compensate the victim. This is simply an accident. In those cases where victims are harmed seriously for life, our society, through a variety of private and public means, has set up a "safety net," which these people may rely on to continue their lives. The "safety net" may come in the form of work training programs, medical programs, church organizations, etc. Remember: not all victims can blame a defendant for their injuries.

Does joint and several liability currently ensure that all victims are fully compensated?

No. Victims can remain uncompensated if their case if found unprofitable for an attorney to bring to court. Victims also remain uncompensated when all defendants are uninsured, under-insured, bankrupt, indigent or immune. In addition, victims receive far less compensation than what the jury has determined, even where there is a deep pocket, because of the contingency fee and expenses that go to the personal injury lawyer.

If the intent is to compensate all victims fully under all circumstances, then the current system is failing, even with joint and several liability. Our current system of joint and several liability is inefficient and does not perform up to the standards that personal injury lawyers would have us believe.

What have other states that have reformed or abolished their joint and several liability system put into place?

Nothing. The legislatures of those states, recognizing that there is no guaranteed compensation, even with joint and several liability, created no alternate compensation systems. A recent survey of those states showed that there is no growing pool of uncompensated victims clamoring for relief from their current systems.

How many other states exercise Wisconsin's variety of joint and several liability?

Currently, 13 states, including Wisconsin, have not changed their joint and several liability systems.

Would abolishment of joint and several liability in Wisconsin mean that negligent manufacturers and other parties would no longer be held accountable for their actions?

No, on the contrary. Negligent parties would still be held accountable for exactly the same amount of their negligence.

Who supports joint and several liability reform in Wisconsin?

The public. In a recent poll commissioned by the Wisconsin Coalition for Civil Justice, 68% of Wisconsin citizens believe that the current law of joint and several liability should be changed. They agreed that, although it is important that a victim be paid, it is unfair that one person should be forced to pay damages for injuries caused by another.

Who wants to keep the system the way it is?

Personal injury lawyers who profit from it and some groups that have been ill-advised by the impact of the current law, including the labor unions. Nationally, the American Trial Lawyers Association has fought reform in every state where it has been proposed. Locally, the Wisconsin Academy of Trial Lawyers is the most active outspoken opponent of changing the current system because they know that eliminating joint and several liability will have a direct impact on their pocketbooks. This lucrative system of good intentions has gone awry.

What would be the overall benefit to eliminating joint and several liability?

Aside from returning the civil justice system to its origins of fairness to all litigants, we believe that the abuses related to settlement will cease. Instead of the system being used to intimidate and leverage insupportable settlements, the system will serve as a framework for reasonable negotiation.

In short, elimination of joint and several liability may help restore an atmosphere of reasonableness and common sense to a system that now compensates one victim by victimizing another, and penalizing the many for the benefit of the few.

THE BUSINESS EXPERIENCE & Tort Reform

WHY DO WE NEED TORT REFORM?

Often, the business community is asked to "prove" there is a problem with the tort system. Is the tort system really responsible for the loss of jobs, lack of insurance, increase in cost of services and lack of new product development? Unfortunately, there is no easy answer.

The fact is, businesses and individuals are reluctant to talk about lawsuits for a variety of reasons:

- Many lawsuits, some estimate 90 percent, are settled out of court and include a nondisclosure clause that prohibits parties from discussing the details of a case.

- Many cases are pending and can not be discussed.

- Corporations are reluctant to discuss a case for fear the plaintiff lawyers, through a sophisticated information exchange, will use the details of a case to generate more lawsuits.

The plaintiff attorneys for their part, are reluctant to disclose out-of-court settlements in the context of tort reform, lest they reveal how the system really works, thereby jeopardizing a lucrative source of income. This lack of evidence is cited as proof that there really is no need for tort reform. Meanwhile the abuses continue.

Despite their concerns, WMC members often write and give examples of the lawsuit abuse that is carried on daily under our tort laws. What follows is a small sample of the letters we receive. Each is a real life example of what businesses are subject to in the course of doing business in Wisconsin. Most of the businesses asked not to be identified, therefore we chose not to identify any. These letters were received in February 1995.

Wisconsin Manufacturers & Commerce
P.O. Box 352
Madison, WI 53701-0352
608/258-3400

WMC
REPRESENTING WISCONSIN BUSINESS

"Approximately ten years ago, we sent about $700 worth of waste to a waste site in central Wisconsin. Since then, the company running the waste site went bankrupt, and we are now told we could be liable for not only the $700 but for the entire $750,000 that the government is charging for cleanup. Obviously, there are other companies who use this waste site, but .... suppose the worst happened and my company was the remaining company in business. **If we had to pay, the result would be a huge loss to the point where we may not recover.**"

- Northeastern Wisconsin Manufacturer

"We are self-insured for product liability and take care to ensure that our products are safe to operate and maintain. We have had claims against us that have resulted in considerable legal fees. For example, a claim to a back injury in 1989 was dismissed on summary judgment. Those legal costs were $56,000. If the first claim against our company would have been brought at an earlier date, it might have forced us into bankruptcy. **The cost of defending nuisance claims is so high that the temptation to settle is great.** It seems that plaintiff's attorneys are willing to take on any case for a percentage of the settlement. Legislation that limits legal recovery to some reasonable amount, rather than a percentage, might result in fewer nuisance suits."

- Northern Wisconsin Equipment Manufacturer

"Product liability suits are the biggest and most expensive problems faced by our company. Our company installed a cargo body and hoist on a truck. It is alleged the cargo body collapsed on the claimant. Our bodies with hoists are installed with a body safety prop that is furnished by a manufacturer of hoists and dump bodies, and has been for several years. In many cases, the person does not use a safety prop. Warning labels state if the body is raised, a safety prop must be put into place, etc. When this occurs, the person who installs the hoist and the manufacturer are always brought into the case even though it is due to negligence of the person who was injured."

- Southern Wisconsin Manufacturer

- continued -

"We find that we are named in class action suits in hundreds of situations where the plaintiff is not even required to know whether he, in fact, owns any of our products. It then becomes our obligation to send someone to that site to search through the site to be certain that our products are not in that location. Not only is the cost of our employee's time and expenses involved, but we must also have an attorney file to have us dropped from that particular suit."

- Southeastern Wisconsin Manufacturer

"Recently we were named in a personal injury suit. After we sent our expert to the site, we found that the machine that injured the worker did not contain our product, but the machine next to it did. **It would seem that the plaintiff should at least have the responsibility of knowing that our products are involved before you are named in a class action suit.** We feel that we are responsible business citizens and have been in business here since 1916. If we make a mistake, we should be held accountable for that mistake. We have received many suits and are proud of the fact that we have never lost or settled a suit in the history of our company. We are extremely safety and quality conscious and see our present legal system as doing nothing but adding costs to our operation. **Tort reform in a competitive world is no longer an option. It is an absolute must."**

- Southeastern Manufacturer

"A recent example of abuses in litigation is where our truck made a left turn and a person on a motorcycle slid into the truck as it was making the turn. The person was on a stolen motorcycle fleeing law enforcement officials at the time of the accident. He was awarded damages while serving time in prison for the unlawful act. If Wisconsin and the United States are to remain competitive in the emerging world market, we cannot be shackled by the burden of these ridiculous damage awards. **Litigation is not a value-added service to a product but a cost that has to be absorbed by all of society."**

- Northeastern Wisconsin Manufacturer

"A pickup truck driven by one of our foreman collided with an automobile which failed to stop for a stop sign. The wife of the driver sued our firm for personal injury damages. Our driver swerved left in an effort to avoid the collision, **but since our truck's front tire crossed the center line, significant negligence could be alleged relative to the negligence of the 'innocent passenger'.** The plaintiff presented a pitiable plaintiff obstacle, and had this proceeded to trial because of our alleged negligence in swerving to avoid the collision, we could have been held accountable for a large amount of damages. We settled this case."

- Central Wisconsin Contractor

"Recently while visiting Mexico, I talked to some American firms and tort reform was a major factor in their decision to move. This may not be true for large corporations, but it is certainly true for the smaller corporations. The United States has lost thousands and thousands of jobs due to lack of tort reform. Our company has been extremely fortunate in not having had any product liability suit. But we are not so fortunate for what we pay for our insurance. This insurance cost is so high that there are many companies operating without insurance. I would think our legislators would want the public protected. Companies that have insurance are paying such exorbitant prices that many of them are thinking about moving to Mexico or Canada."

- Southeastern Wisconsin Manufacturer

"We were sued for damages to a tug that sustained no damages at all. In fact, they were still using the original products which were eight years old. They said the products should be able to go anywhere in the world, and they had heard we had trouble with this particular design. We were forced to defend ourselves against the plaintiff. It cost us $5,000 to convince the court that the case was frivolous and they dismissed the suit. It costs only $500 to start a frivolous action and a good $5,000 to defend against it."

- Northern Wisconsin Manufacturer

"Although we were successful in having the following judgment overturned on appeal, we ultimately settled this case for a fairly substantial confidential settlement and incurred $245,000 in costs and attorney fees in determining this case. Several years ago, one of our crews working on a fallen line lent a tree contractor a clevis when one of his cables broke. After we lent the clevis, the contractor who was cutting the trees had a tree fall and strike the plaintiff on the head. **The plaintiff brought suit against our company because the contractor had no assets or insurance.** This case was based on the fact that: 1) our lending the clevis showed that we were helping remove the trees; and 2) we should have seen how dangerous this situation was and stopped it. Although our negligence in the trial was found to be 10% at fault, we were responsible for 90% of the damages because the contractor, who was primarily at fault, could not pay his share."

- Northern Wisconsin Utility Contractor

"We sold a small aerial lift as a distributor. We picked up the unit at the manufacturer and delivered it to the customer. We did not work on the unit and never had it at our plant. A weld failed; an individual was hurt. Our insurance company paid on this claim because both the manufacturer of the unit and their product liability insurance company went bankrupt. I am sorry that I do not know how much was spent by our insurance company, but I am sure it totaled tens of thousands of dollars. We have changed wording on literature at the advice of our insurance company. **There is nothing in business that has caused more loss of sleep."**

- Northern Wisconsin Manufacturer

"My concern with the current status of Wisconsin's tort law in this area can be illustrated by one of several of the lawsuits we have been involved in, which serves as a good example of the absence of any fair and just set of rules applying product liability matters. An employee of a business was injured when the owner of the building failed to put pressure limit controls on his main natural gas line and a fire resulted. In this instance, the owner had virtually no assets and the employer/operator had limited liability under Workers' Compensation. Our insurer settled in seven figures, since under joint and several liability, if the manufacturer is the only defendant left with assets (the deep pocket) and the manufacturer is found by the jury to be as little as 1% negligent (the jury will always find at least that, considering the units had our name on them), the manufacturer is exposed to the liability for the entire potential judgment. It is interesting in that the party stipulated or agreed upon virtually all the facts almost immediately, and plaintiff's counsel spent not more than 150 hours on it, yet collected a contingency fee of $250,000. **I can recall sitting at a conference table with plaintiff's counsel during discussion of potential settlement, when he stated to me he realized he did not have a case, but between the exposure to joint and several liability and the acknowledged high cost of defending the law suit, he was sure we would want to settle."**

- Southeastern Wisconsin Manufacturer

"Our current system of product liability laws is a huge drag on economic progress. It creates lawsuits. **Resources that should be for designing and building products and creating jobs, or compensating injured consumers are paying litigators instead. We are in a tough competitive race and this is a handicap we can't afford."**

- North Central Manufacturer

"Our biggest concern lately has been environmental liability exposure for incidents which took place over 50 years ago. For example, we have been named in several superfund clean-up sites simply for properly disposing of one or two barrels containing special waste, or containing only residue from glues used in the manufacturing process. We have been named along with others because the barrel reclamation site has gone bankrupt and because other heavy generators have also gone bankrupt. These environmental cases take a lot of time and money to resolve. **Just because we've been in business for years and are a responsible corporate citizen, we end up paying the price for ourselves, as well as other generators who are no longer in business, not to mention the site operator who was already paid in good faith to properly dispose of the waste."**

- Southeastern Manufacturer

"We have considered expanding our plant several times in the recent past, but each time we have not acted because of the environmental uncertainty. Again, we do not want to be held liable down the road for waste that has been properly disposed of years earlier. **We will likely scale down or discontinue our operations in the future."**

- Southeastern Manufacturer

"Over the last year, we were forced to defend at least two frivolous lawsuits. **The time and money expended to defend these suits was quite disproportionate to the injuries claimed.** Yet, we decided to settle the claims simply because it was not worth it to defend them any longer. In the end, the plaintiffs accomplished what they had set out to do."

- Southeastern Manufacturer

"I was a delegate to the White House Conference on Small Business in 1986 and tort reform was one of our priorities way back then and it still is now. **Our Governor's Conference on Small Business in 1981, 1987 and 1991 had joint and several liability as one of the top priorities listed as a major concern in operating their businesses."**

- Northern Wisconsin Business

"Our company was sued for trespassing. **Even though trespassing is a misdemeanor and is covered by Wisconsin Statutes, the attorney in this case pursued punitive damages through a jury trial.** The sympathetic jury charged with the emotional testimony that an elderly couple's rights had been violated and representatives did, in fact, trespass on their property, awarded the plaintiffs $100,000 to 'send a message to business that it would not forget' "

- Central Wisconsin Business

"Even though the facts indicate that the very vast majority of the responsibility for a plaintiff's accident falls upon the conduct of the farmer, the manufacturer may be called upon to satisfy the entire judgment which may result. Under these circumstances, all the plaintiff need do is demonstrate a mere modicum of responsibility on the part of the manufacturer (perhaps, due to insufficient warning or an argument that the removal of the safety guard should have disabled the machine) and the plaintiff then has the entire deep pocket of the manufacturer from which to satisfy his judgment against the farmer. **Tapping this deep pocket seems to have become the objective of the civil law, rather than doing justice. As a consequence, public confidence in our judicial system has deteriorated. There can be no question whatsoever that tort feasors must be held accountable for their tortious conduct. It is, however, fundamentally unfair and the antithesis of the concept of justice to hold a party responsible for the liability of another."**

- Northern Wisconsin Manufacturer

"A defective and poorly maintained space heater resulted in carbon monoxide poisoning to three individuals. The owner of the motel had allowed his liability insurance to expire, so the plaintiff sued the supplier of natural gas to the motel, as well as to state-employed inspectors. The installers of the defective space heater were no longer in business. The court of appeals held that the two state inspectors were immune from liability and the owner of the motel had no insurance. **The effect of the current law, as it relates to joint and several liability, meant that the gas supplier ultimately paid 100% of the judgment, despite the fact that it was found by the jury to be only 20% casually negligent.** The total damages approached $1.2 million; in addition, our legal fees in connection with the case were in excess of $110,000."

- Wisconsin Gas Supplier

"The policy of joint and several liability, in effect, creates two victims from one crime — the plaintiff and the party deemed most able to pay, regardless of negligence. As a businessman and employer of more than 900 Wisconsin citizens, I am prepared and willing to recompense in accordance with my level of fault, should such a situation occur. I resent, however, that the current legal environment is forcing us to maintain huge amounts of liability insurance, simply to protect ourselves from the opportunistic trial lawyers who would most certainly view us as a particularly deep pocket from which to draw their fortune."

- Central Wisconsin Printer

"Most important is the elimination of joint and several liability. I assume that we all seek fairness in the law. We cannot force defendants to pay judgments that are far out of proportion to their cause of the problem."

- Central Wisconsin Business

"The current product liability system has been best characterized as costly and inequitable, ultimately benefiting no one. Transaction costs associated with the legal process often exceed the actual compensation award. These costs ultimately are passed on to the consumer ... ironically, the very group American industry relies upon to survive in an ever increasingly competitive marketplace. I believe that responsibility for negligence needs to be redirected back to those parties who are truly negligent. **Punishing companies for the negligent actions of others in the name of consumer fairness is irresponsible and does not serve justice."**

- Southeastern Wisconsin Manufacturer

"Product liability suits are the biggest and most expensive problems faced by our company and other companies like ours, not only in Wisconsin but throughout the nation."

- South Central Wisconsin Distributor

"In this case, the plaintiff, a garbage truck driver, was getting into the truck when it is alleged the hand brake failed, permitting the truck to roll down hill, crushing his left leg which was subsequently amputated. **The initial investigation indicated that the plaintiff admitted to his employer that his own negligence caused the accident.** As he was getting into the truck, he released the brake before he was completely in the truck. Once the brake was released and the truck started rolling, he fell out. In this situation, we installed a tag axle many years ago. The truck was checked after the accident by the State Police Department and was declared to be in safe operating condition. We were brought into this case on the last day of the statute of limitations."

- South Central Wisconsin Business

"We found ourselves as a defendant in a personal injury accident involving four plaintiffs seriously burned in an industrial accident. **Apart from being out-lawyered by the plaintiffs' counsel, as to the degree of negligence, our firm was left with sole responsibility for the entire multi-million dollar jury verdict, although the combined negligence of the owner, the plaintiffs, the engineering firm and the suppliers far exceeded that of our own firm."**

- Central Wisconsin Business

"Many asbestos cases have been received since the early 1980s. The company continues to defend asbestos suits and expend over $1 million per year between it and its insurance companies in the defense of these suits. The actual awards in these cases have been less than 20 percent of the total amounts spent to defend these cases. **After the plaintiff attorneys take their share, the asbestos claimants actually receive less than 15 percent of the total amounts expended on asbestos litigation."**

- Eastern Wisconsin Business

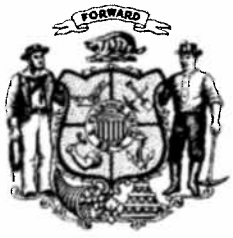
"Two years ago, our golf course subsidiary was named in a suit filed by a golfer who had been struck by another golfer. The accident occurred on the driving range. **The injured party positioned himself in front of another practicing golfer.** The practicing golfer hit an errant shot off the toe of his club, which struck the plaintiff. As the case developed, the plaintiff's attorney began asserting that the "faulty" design of the driving range had contributed to the accident. We eventually settled out of court for $2,000, plus $5,000 in medical expenses. Our attorney was paid $27,000 to defend us."

- Central Wisconsin Contractor

"In our system, it seems that one is presumed guilty until proven innocent. We will expend dollars to defend our company is not involved with a project. So will other who were named in the suit and are probably scratching their heads about why they were named. Joint and several liability must go."

- Central Wisconsin Business


WISCONSIN STATE LEGISLATURE


FORWARD

VIERBICHER
ASSOCIATES

April 4, 1995

Representative Sheryl Albers
P.O. Box 8952
100 North Hamilton St., Room 401
Madison, WI 53708

Dear Sheryl,

I understand the Assembly is close to voting on Senate Bill 11, the tort reform bill on joint and several liability. That is an issue that we have cared about intensely for some time but until this year have had little opportunity to change.

Enclosed is a memo that our association will be distributing to members of the Assembly. I am also enclosing a letter I submitted to the Senate hearing on Senate Bill 11. We are not trying "to chuck our responsibility". We are only trying to be treated in a fiscally fair manner.

If you have questions please call me.

Regards,
VIERBICHER ASSOCIATES, INC.

James A. Vierbicher, P.E.
President

JAV/jmb

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WISCONSIN ASSOCIATION OF CONSULTING ENGINEERS
131 W. Wilson St., Suite 502 Madison, WI 53703 (608) 257-WACE FAX: (608) 257-0009
(9223)

April 4, 1995

TO: All Members of the Assembly

FROM: Robert Brandenburg, Executive Director

The Wisconsin Association of Consulting Engineers has long supported meaningful tort reform in Wisconsin. We believe 1995 Senate Bill 11, as passed by the Senate, represents meaningful reform in the area of joint and several liability. We urge you to concur in Senate Bill 11.

The compromise version passed by the Senate was developed with broad input from a variety of sources within the Senate, Assembly, and affected groups which has resulted in a broad consensus on this complicated subject. Because of the compromise changes already made in the proposal, we urge you to reject all floor amendments and concur in Senate Bill 11, as recommended by the Assembly Judiciary Committee.

Please let me thank you for your support on behalf of the over 60 member firms of the Wisconsin Association of Consulting Engineers and their nearly 4,000 employees.

WACE
WISCONSIN ASSOCIATION OF CONSULTING ENGINEERS

WISCONSIN ASSOCIATION OF CONSULTING ENGINEERS
131 W. Wilson St., Suite 502 Madison, WI 53703 (608) 257-WACE FAX: (608) 257-0009
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TESTIMONY IN SUPPORT OF SENATE BILL 11

I am James A. Vierbicher, PE, President of Vierbicher Associates, Inc., a consulting engineering firm with offices in Reedsburg and Madison. We are a member of the Wisconsin Association of Consulting Engineers (WACE). The testimony I will present today is on behalf of WACE, an industry association representing 68 of the leading consulting engineering firms in Wisconsin and 3,750 employees, e.g. engineers, scientists, technicians and support staff.

WACE is pleased that you have brought back the essence of Senate Bill 152 from the previous legislative session. We believe that it is time to bring fairness back to civil justice. Therefore, **we strongly support the limitations placed on joint and several liability by the proposed Senate Bill 11.**

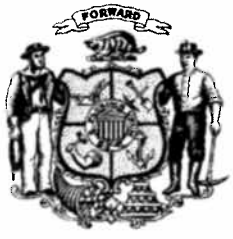
The present statute for joint and several liability places an unfair risk on our profession, and others in a similar position, by potentially imposing a requirement to pay a larger percentage of a judgement than the court determined responsibility. As an example, a person may be injured on a construction project, go to court for remedy, with the result that the jury finds the Contractor 95% responsible for the accident and the Engineer 5%. If the plaintiff's attorney considers the Contractor relatively insolvent, he can elect to recover 100% of the awarded damages from the Engineer.

That is unfair! Engineers are more than willing to accept responsibility for their actions. As a profession, engineers are quite conservative, both by nature and training. Most consulting engineering firms carry expensive errors and omission insurance (2.5%-4% of gross revenues even with large deductibles) in addition to their normal business insurance, to cover professional liability incurred in the course of their work. As a result they are often the "deep pocket" and are so targeted in many a multi-party suit. While we have empathy for the victim we do not believe it makes good economic or social sense to make one party shoulder more than his proportionate share of the damages, simply because he has the financial wherewithal to do so.

WACE applauds the Senate Judiciary and Insurance Committee for again considering reform of Wisconsin's joint and several liability statutes. We strongly urge you to recommend Senate Bill 11 to the full Senate for enactment.

Thank you for the opportunity to present our views. We would be happy to provide more details or information should you so desire.

WISCONSIN STATE LEGISLATURE



895.045(1) DEFINITIONS. In this section:

(a) "Plaintiff" means the party seeking to recover damages whether denominated a plaintiff or not.

(b) "Defendant" means the party from whom damages are sought whether denominated a defendant or not.

(2) COMPARATIVE NEGLIGENCE. Plaintiff's negligence shall not bar recovery in an action by plaintiff or plaintiff's legal representative to recover damages for negligence resulting in death or injury to person or property, if plaintiff's negligence is not greater than the negligence of defendant. The negligence of plaintiff shall be compared separately to the negligence of each defendant. The liability of each defendant for plaintiff's damages is limited to the percentage of negligence attributed to each defendant less the percentage of negligence attributed to plaintiff.

895.045(1) COMPARATIVE NEGLIGENCE. Contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or an injury to person or property, if such negligence was not greater than the negligence of the person from whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the person seeking to recover damages shall be measured separately against the negligence of each person from whom recovery is sought. The liability of each person from whom recovery is sought is limited to the percentage of the total causal negligence attributed to that party. (less the percentage of the total causal negligence attributed to the person seeking recovery?)

I. MR. KAHABKA IS QUALIFIED AS AN EXPERT.

As noted by the Defendants, the trial court has wide discretion with regard to the question of an expert witness' qualifications. *State v. Robinson*, 146 Wis. 2d 315, 332, 431 N.W.2d 165, 171 (1988). The basic test for determining the qualification of an expert is whether the expert's opinion, based on his or her experience and knowledge, will assist the jury in arriving at a conclusion. *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 71, 443 N.W.2d 50, 59 (Ct. App. 1989). "With such a test, expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time." *Maci v. State Farm Fire and Casualty Co.*, 105 Wis. 2d 710, 720, 314 N.W.2d 914, 920 (Ct. App. 1981). The analysis to be undertaken regarding the admission of expert testimony was summarized by the Wisconsin Supreme Court in *Jacobson v. Greyhound Corp.*, 29 Wis. 2d 55, 63, 138 N.W.2d 133, 137 (1965). The court stated:

> First, the subject of the inference must be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge, or experience in that field or calling as to make it appear that his opinion

or inference will probably aid the trier in his search for truth.

Both parts of the above-referenced test are satisfied with regard to Plaintiffs' liability expert, William Kahabka. First, this case involves the explosion of propane gas which escaped from a multi-port valve. The functioning of the component parts of the valve are not matters which are common to the general knowledge and experience of members of the community. It is therefore proper and, in fact, necessary that expert testimony be admitted to help the jury, in the language of § 907.02, Stats., "understand the evidence [and] to determine a fact and issue."

The Defendants also believe that expert testimony is necessary in order to help the jury understand the evidence as they have named their own expert to provide testimony concerning the valve. They argue, however, that the second part of the test propounded in *Jacobson* has not been met in that Mr. Kahabka does not have such skill, knowledge or experience such that his opinion will probably aid the jury in their search for truth.

tity of Books, the Court describes the constitutional infirmity in those cases as follows: "the Government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." *Ante*, at 2772. But the same constitutional defect is present in the case before us today and the Court fails to explain why it is not fatal to the forfeiture punishment here under review. Thus, while in the past we invalidated seizures which resulted in a temporary removal of presumptively protected materials from circulation, today the Court approves of government measures having the same permanent effect. In my view, the forfeiture of expressive material here that had not been adjudged to be obscene, or otherwise without the protection of the First Amendment, was unconstitutional.

* * * * * *

Given the Court's principal holding, I can interpose no objection to remanding the case for further consideration under the Eighth Amendment. But it is unnecessary to reach the Eighth Amendment question. The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles. I dissent from the judgment and from the opinion of the Court.

William DAUBERT, et ux., etc., et al., Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.

No. 92-102.

Argued March 30, 1993

Decided June 28, 1993.

Infants and their guardians ad litem sued pharmaceutical company to recover for limb reduction birth defects allegedly sustained as result of mothers' ingestion of antinausea drug Bendectin. The United States District Court for the Southern District of California, 727 F.Supp. 570, granted company's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, 951 F.2d 1128, affirmed. Plaintiffs filed petition for writ of certiorari, which was granted. The Supreme Court, Justice Blackmun, held that: (1) "general acceptance" is not necessary precondition to admissibility of scientific evidence under Federal Rules of Evidence, and (2) Rules assign to trial judge the task of ensuring that expert's testimony both rests on reliable foundation and is relevant to task at hand.

Vacated and remanded.

Chief Justice Rehnquist filed opinion concurring in part and dissenting in part in which Justice Stevens joined.

1. Evidence ⇐150

Federal Rules of Evidence superseded *Frye* "general acceptance" test for admissibility of scientific evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2. Federal Civil Procedure ⇐21

Supreme Court interprets legislatively enacted Federal Rules of Evidence as it would any statute.

3. Evidence ⇐99

Basic standard of relevance under Federal Rules of Evidence is liberal one. Fed.Rules Evid.Rules 401, 402, 28 U.S.C.A.

4. Evidence ⇐150

Rigid "general acceptance" requirement for admission of scientific evidence would be at odds with "liberal thrust" of Federal Rules of Evidence and their general approach of relaxing traditional barriers to "opinion" testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

5. Evidence ⇐150

Trial judge is not disabled under Federal Rules of Evidence from screening purportedly scientific evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

6. Evidence ⇐150

Under Federal Rules of Evidence, trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

7. Evidence ⇐150

"Scientific," within meaning of Federal Rule of Evidence stating that if "scientific," technical, or other specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto, implies grounding in methods and procedures of science. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

8. Evidence ⇐508

"Knowledge," within meaning of Federal Rule of Evidence stating that if scientific, technical, or other specialized "knowledge" will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto, connotes more than subjective belief or unsupported speculation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

9. Evidence ⇐508

Subject of scientific knowledge need not be "known" to certainty to permit expert testimony, since, arguably, there are not certainties in science. Fed.Rules Evid. Rule 702, 28 U.S.C.A.

10. Evidence ⇐508

Inference or assertion must be derived by scientific method to qualify as "scientific knowledge," within meaning of Federal Rule of Evidence stating that if scientific, technical, or other specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto. Fed.Rules Evid. Rule 702, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

11. Evidence ⇐555.1

For scientific testimony to be admitted, proposed testimony must be supported by appropriate validation, in other words, "good grounds" based on what is known. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

12. Evidence ⇐508

Requirement under Federal Rule of Evidence that expert's testimony pertain to "scientific knowledge" establishes standard of evidentiary reliability. Fed.Rules Evid. Rule 702, 28 U.S.C.A.

13. Evidence ⇐150

In case involving scientific evidence, evidentiary reliability will be based upon scientific reliability. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

14. Evidence ⇐150

Condition for admission of scientific evidence or testimony under Federal Rule of Evidence, that evidence or testimony assist trier of fact to understand evidence or to determine fact in issue, goes primarily to relevance. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

15. Evidence ⇐150

In determining admissibility of scientific evidence or testimony, scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

16. Evidence ⇐150

"Helpfulness" standard under Federal Rule of Evidence for admissibility of scientific evidence or testimony requires valid scientific connection to pertinent inquiry as precondition to admissibility. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

17. Evidence ⇐505

Unlike ordinary witness, expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. Fed.Rules Evid.Rules 701–703, 28 U.S.C.A.

18. Evidence ⇐508

Presumably, relaxation under Federal Rules of Evidence of usual requirement of first-hand knowledge when there is testimony by expert is premised on assumption that expert's opinion will have reliable basis in knowledge and experience of his discipline. Fed.Rules Evid.Rules 701–703, 28 U.S.C.A.

19. Evidence ⇐508

Faced with proffer of expert scientific testimony, trial judge must determine at outset whether expert is proposing to testify to (1) scientific knowledge that (2) will assist trier of fact to understand or determine fact in issue; preliminary assessment must be made of whether reasoning or methodology underlying testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to facts in issue. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

20. Evidence ⇐546

Preliminary questions concerning qualification of person to be witness, existence of privilege, or admissibility of evidence should be established by preponderance of proof. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

21. Evidence ⇐150

Requirements for admissibility of scientific testimony or opinion under Federal Rule of Evidence do not apply specially or exclusively to unconventional evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

22. Evidence ⇐9

Scientific theories that are so firmly established as to have obtained status of scientific law, such as laws of thermodynamics, properly are subject to judicial notice. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

23. Evidence ⇐555.1

Definitive checklist or test does not exist in making preliminary assessment of whether reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to facts in issue. Fed.Rules Evid.Rule 104(a), 28 U.S.C.A.

24. Evidence ⇐508

Ordinarily, key question to be answered in determining whether theory or technique is scientific knowledge that will assist trier of fact, and, thus, whether expert testimony is admissible, will be whether theory or technique can be, and has been, tested. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

25. Evidence ⇐508

In determining whether theory or technique is scientific knowledge that will assist trier of fact, and, thus, whether expert testimony is admissible, is whether theory or technique has been subjected to peer review and publication. Fed.Rules Evid. Rules 104(a), 702, 28 U.S.C.A.

26. Evidence ⇐508

Publication of theory or technique, which is but one element of peer review, is not sine qua non of admissibility of expert testimony; publication does not necessarily correlate with reliability, and, in some instances, well-grounded but innovative theories will not have been published. Fed. Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

27. Evidence ⇐508

Fact of publication of theory or technique, or lack thereof, in peer-review journal will be relevant, though not dispositive, consideration in assessing scientific validity of particular technique or methodology on which expert opinion is premised; submission to scrutiny of scientific community is component of "good science," in part because it increases likelihood that substantive flaws in methodology will be detected. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

28. Evidence ⇐508

In determining admissibility of expert opinion regarding particular scientific technique, court ordinarily should consider known or potential rate of error, and existence and maintenance of standards controlling technique's operation. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

29. Evidence ⇐508

"General acceptance" of scientific theory or technique can have bearing in determining admissibility of expert testimony. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

30. Evidence ⇐150

Widespread acceptance of scientific theory or technique can be important factor in ruling particular evidence admissible, and known technique that has been able to draw only minimal support within community may properly be viewed with skepticism. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

31. Evidence ⇐150

Inquiry envisioned by Federal Rule of Evidence pertaining to admission of scientific testimony and evidence is flexible one. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

32. Evidence ⇐150

Overarching subject of Federal Rule of Evidence on admission of scientific testimony and evidence is scientific validity, and, thus, evidentiary relevance and reliability, of principles that underlie proposed submission. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

33. Evidence ⇐150

Focus of Federal Rule of Evidence on admission of scientific testimony and evidence must be solely on principles and methodology, not on conclusions that they generate. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

34. Evidence ⇐546

Judge assessing proffer of expert's scientific testimony under Federal Rule of Evidence on testimony by experts should also be mindful of other applicable rules, including rule on expert opinions based on otherwise inadmissible hearsay, rule allowing court to procure assistance of expert of its own choosing, and rule permitting exclusion of relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury. Fed.Rules Evid.Rules 403, 702, 703, 706, 28 U.S.C.A.

35. Federal Civil Procedure ⇐2146, 2546

In event that trial court concludes that scintilla of scientific evidence presented supporting a position is insufficient to allow reasonable juror to conclude that position more likely than not is true, court remains free to direct verdict, and likewise to grant summary judgment. Fed.Rules Civ.Proc.Rules 50(a), 56, 28 U.S.C.A.; Fed. Rules Evid.Rule 702, 28 U.S.C.A.

36. Federal Civil Procedure ⇐21

Federal Rules of Evidence are designed not for exhaustive search for cosmic understanding but for particularized resolution of legal disputes.

Syllabus *

Petitioners, two minor children and their parents, alleged in their suit against respondent that the children's serious birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert's affidavit concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although petitioners had responded with the testimony of eight other well-credentialed

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

experts, who based their conclusion that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies, the court determined that this evidence did not meet the applicable "general acceptance" standard for the admission of expert testimony. The Court of Appeals agreed and affirmed, citing *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014, for the rule that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

Held: The Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial. Pp. 2792–99.

(a) *Frye*'s "general acceptance" test was superseded by the Rules' adoption. The Rules occupy the field, *United States v. Abel*, 469 U.S. 45, 49, 105 S.Ct. 465, 467, 83 L.Ed.2d 450, and, although the common law of evidence may serve as an aid to their application, *id.*, at 51–52, 105 S.Ct., at 468–469, respondent's assertion that they somehow assimilated *Frye* is unconvincing. Nothing in the Rules as a whole or in the text and drafting history of Rule 702, which specifically governs expert testimony, gives any indication that "general acceptance" is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the Rules' liberal thrust and their general approach of relaxing the traditional barriers to "opinion" testimony. Pp. 2792–94.

(b) The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific ... knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word "knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Pp. 2794–96.

(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 2796–98.

(d) Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising "general acceptance" standard, is the appropriate means by which evidence based on valid principles may be challenged. That even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. Pp. 2798–99.

951 F.2d 1128 (CA9 1991), vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II–A, and the opinion of the Court with respect to Parts II–B, II–C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined.

Michael H. Gottesman, Washington, DC, for petitioners.

Charles Fried, Cambridge, MA, for respondent.

Justice BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription anti-nausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.[1] Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects—more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (*i.e.*, a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.[2] These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously

1. Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34–44.

2. For example, Shanna Helen Swan, who received a master's degree in biostatics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the section of the California Department of Health and Services that determines causes of birth defects, and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. App. 113–114, 131–132. Stewart A. Newman, who received his master's and a doctorate in chemistry from Columbia University and the University of Chicago, respectively, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. App. 54–56. The credentials of the others are similarly impressive. See App. 61–66, 73–80, 148–153, 187–192, and Attachment to Petitioners' Opposition to Summary Judgment, Tabs 12, 20, 21, 26, 31, 32.

published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is "'sufficiently established to have general acceptance in the field to which it belongs.'" 727 F.Supp. 570, 572 (S.D.Cal. 1989), quoting *United States v. Kilgus*, 571 F.2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence is not admissible to establish causation. 727 F.Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F.2d 1128 (1991). Citing *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. 951 F.2d, at 1129–1130. The court declared that expert opinion based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field ... cannot be shown to be 'generally accepted as a reliable technique.'" *Id.*, at 1130, quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (CA9 1985).

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F.2d, at 1130–1131. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community." *Id.*, at 1130. Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.*, at 1131. The court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, — U.S. —, 113 S.Ct. 320, 121 L.Ed.2d 240 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e.g.*, *United States v. Shorter*, 257 U.S.App.D.C. 358, 363–364, 809 F.2d 54, 59–60 (applying the "general acceptance" standard), cert. denied, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987), with *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

II

A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.[3]

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" 54 App.D.C., at 47, 293 F., at 1014 (emphasis added).

3. For a catalogue of the many cases on either side of this controversy, see P. Gianelli & E. Imwinkelried, Scientific Evidence § 1–5, pp. 10–14 (1986 & Supp.1991).

4. See, *e.g.*, Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of *Agent Orange* and Bendectin Litigation, 86 Nw.U.L.Rev. 643 (1992) (hereinafter Green); Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years—the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo.Wash.L.Rev. 857, 876–885 (1992); Hanson, "James Alphonso Frye is Sixty-Five Years Old; Should He Retire?," 16 W.St.U.L.Rev. 357 (1989); Black, A Unified Theory of Scientific Evidence, 56 Ford.L.Rev. 595 (1988); Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C.L.Rev. 1 (1988); Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 235 (1986); Gianelli, The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half-Century Later, 80 Colum.L.Rev. 1197 (1980); The Supreme Court, 1986 Term, 101 Harv. L.Rev. 7, 119, 125–127 (1987).

Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid.*

[1] The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.[4] Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.[5] We agree.

[2, 3] We interpret the legislatively-enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S.Ct. 439, 446, 102 L.Ed.2d 445 (1988). Rule 402 provides the baseline:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of

Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term—"*Frye*-ologist"—has been advanced to describe those who take part. See Behringer, Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J., at 239, quoting Lacey, Scientific Evidence, 24 Jurimetrics J. 254, 264 (1984).

5. Like the question of *Frye*'s merit, the dispute over its survival has divided courts and commentators. Compare, *e.g.*, *United States v. Williams*, 583 F.2d 1194 (CA2 1978), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979) (*Frye* is superseded by the Rules of Evidence), with *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1111, 1115–1116 (CA5 1991) (en banc) (*Frye* and the Rules coexist), cert. denied, — U.S. —, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03], pp. 702–36 to 702–37 (1988) (hereinafter Weinstein & Berger) (*Frye* is dead), and M. Graham, Handbook of Federal Evidence § 703.2 (2d ed. 1991) (*Frye* lives). See generally P. Gianelli & E. Imwinkelried, Scientific Evidence § 1–5, pp. 28–29 (1986 & Supp.1991) (citing authorities).

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Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Relevant evidence" is defined as that which has "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." Rule 401. The Rule's basic standard of relevance thus is a liberal one.

Frye, of course, predated the Rules by half a century. In *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.*, at 49, 105 S.Ct., at 467, but, quoting Professor Cleary, the Reporter, explained that the common law nevertheless could serve as an aid to their application:

> "In principle, under the Federal Rules no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided....' In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." *Id.*, at 51–52, 105 S.Ct., at 469.

We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.*, at 50–51, 105 S.Ct., at 468–469. In *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

[4] Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, provides:

> "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."

Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a "general acceptance" standard. The drafting history makes no mention of *Frye*, and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey*, 488 U.S., at 169, 109 S.Ct., at 450 (citing Rules 701 to 705). See also Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631, 631 (1991) ("The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts"). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.[6]

B

[5, 6] That the *Frye* test was displaced by the Rules of Evidence does not mean,

6. Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally-enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.[7] Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

[7–13] The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "*If scientific*, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue" an expert "may testify *thereto*." The subject of an expert's testimony must be "scientific ... knowledge."[8] The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, *e.g.*, Brief for Nicolaas Bloembergen et al. as *Amici Curiae* 9 ("Indeed, scientists do not assert that they know what is immutably 'true'—they are committed to searching for new, temporary theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science and the National Academy of Sciences as *Amici Curiae* 7–8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement") (emphasis in original). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.[9]

[14–16] Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful." 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States v. Downing*, 753 F.2d 1224, 1242 (CA3 1985)

7. THE CHIEF JUSTICE "do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility," *post*, at 2800, but would neither say how it does so, nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

8. Rule 702 also applies to "technical, or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

9. We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). See Black, A Unified Theory of Scientific Evidence, 56 Ford.L.Rev. 595, 599 (1988). Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 256 (1986), our reference here is to *evidentiary* reliability—that is, trustworthiness. Cf., *e.g.*, Advisory Committee's Notes on Fed. Rule Evid. 602 ("[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'" (citation omitted)); Advisory Committee's Notes on Art. VIII of the Rules of Evidence (hearsay exceptions will be recognized only "under circumstances supposed to furnish guarantees of trustworthiness"). In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.

("An additional consideration under Rule 702—and another aspect of relevancy—is 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"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, and 26 Jurimetrics J. 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

[17, 18] That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of first-hand knowledge—a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" Advisory Committee's Notes on Fed.Rule Evid. 602 (citation omitted)—is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

10. Rule 104(a) provides:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges." These matters should be established by a preponderance of proof. See *Bourjaily v. United States*, 483 U.S. 171, 175–176, 107 S.Ct. 2775, 2778–2779, 97 L.Ed.2d 144 (1987).

C

[19–23] Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),[10] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[11] This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

[24] Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green, at 645. See also C. Hempel, Philosophy of Natural

11. Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed.Rule Evid. 201.

Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

[25–27] Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers 61–76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 263 J.Am. Med.Assn. 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, Reliable Knowledge: An Exploration of the Grounds for Belief in Science 130–133 (1978); Relman and Angell, How Good Is Peer Review?, 321 New Eng.J.Med. 827 (1989). The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

[28] Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, *e.g.*, *United States v. Smith*, 869 F.2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation. See *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

[29, 30] Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F.2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique that has been able to attract only minimal support within the community," *Downing*, *supra*, at 1238, may properly be viewed with skepticism.

[31–33] The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.[12] Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

[34] Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inad-

12. A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, *e.g.*, *Downing*, 753 F.2d at 1238–1239 (on which our discussion draws in part); 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42 (on which the *Downing* court in turn partially relied); McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L.Rev. 879, 911–912 (1982); and Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.

missible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F.R.D., at 632.

III

[35] We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. 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. See *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. Cf., *e.g.*, *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), cert. denied, 506 U.S. ——, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F.2d 166 (CA5 1989), cert. denied, 494 U.S. 1046, 110 S.Ct. 1511, 108 L.Ed.2d 646 (1990); Green 680–681. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

[36] Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, *e.g.*, Brief for Ronald Bayer et al. as *Amici Curiae*. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.[13]

IV

To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice STEVENS joins, concurring in part and dissenting in part.

The petition for certiorari in this case presents two questions: first, whether the rule of *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), remains good law after the enactment of the Federal Rules of Evidence; and second, if *Frye* remains valid, whether it requires expert scientific testimony to have been subjected to a peer-review process in order to be admissible. The Court concludes, correctly in my view, that the *Frye* rule did not survive the enactment of the Federal Rules of Evidence, and I therefore join Parts I and II–A of its opinion. The second question presented in the petition for certiorari necessarily is mooted by this holding, but the Court nonetheless proceeds to construe Rules 702 and 703 very much in the abstract, and then offers some "general observations." *Ante*, at 2796.

"General observations" by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations—they are not applied to deciding whether or not particular testimony was or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their *amici*. Twenty-two *amicus* briefs have been filed in the case, and indeed the Court's opinion contains no less than 37 citations to *amicus* briefs and other secondary sources.

The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 703 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

But even if it were desirable to make "general observations" not necessary to de-

13. This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral ... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, The Nature of the Judicial Process 178, 179 (1921).

cide the questions presented, I cannot subscribe to some of the observations made by the Court. In Part II–B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante*, at 2794–95. Federal Rule of Evidence 402 provides, as the Court points out, that "[e]vidence which is not relevant is not admissible." But there is no similar reference in the Rule to "reliability." The Court constructs its argument by parsing the language "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ... an expert ... may testify thereto...." Fed.Rule Evid. 702. It stresses that the subject of the expert's testimony must be "scientific ... knowledge," and points out that "scientific" "implies a grounding in the methods and procedures of science," and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." *Ante*, at 2794–95. From this it concludes that "scientific knowledge" must be "derived by the scientific method." *Ante*, at 2795. Proposed testimony, we are told, must be supported by "appropriate validation." *Ante*, at 2795. Indeed, in footnote 9, the Court decides that "[i]n a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." *Ante*, at 2795, n. 9 (emphasis in original).

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of "technical or other specialized knowledge"—the other types of expert knowledge to which Rule 702 applies—or are the "general observations" limited only to "scientific knowledge"? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge" be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 2796. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 2796. Following this sentence are three quotations from treatises, which speak not only of empirical testing, but one of which states that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability," *ante*, pp. 2796–97.

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

Richard Lyle AUSTIN, Petitioner,

v.

UNITED STATES.

No. 92–6073.

Argued April 20, 1993.

Decided June 28, 1993.

The United States initiated civil forfeiture proceedings against body shop and mobile home after owner pleaded guilty to drug offense. The United States District Court for the District of South Dakota, John B. Jones, Chief Judge, granted government's motion for summary judgment, and owner appealed. The Court of Appeals, 964 F.2d 814, affirmed. Certiorari was granted. The Supreme Court, Justice Blackmun, J., held that Eighth Amendment's excessive fines clause applies to in rem civil forfeiture proceedings.

Reversed and remanded.

Justice Scalia concurred in part, concurred in judgment, and filed opinion.

Justice Kennedy, concurred in part, concurred in judgment, and filed opinion joined by Chief Justice Rehnquist and Justice Thomas.

1. Criminal Law ⇐1214
Forfeitures ⇐3

Eighth Amendment's excessive fines clause applies to in rem civil forfeiture proceedings. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(4, 7), 21 U.S.C.A. § 881(a)(4, 7); U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐1214

Excessive fines clause limits government's power to extract payments, whether in cash or in kind, as punishment for some offense. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐1214

Civil or criminal nature of in rem forfeiture is irrelevant to applicability of excessive fines clause; rather, determinative question is whether or not the forfeiture is punishment. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(4, 7), 21 U.S.C.A. § 881(a)(4, 7); U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇐1214

Forfeiture may serve remedial purpose and still be subject to excessive fines clause, but it is necessary that forfeiture can only be explained as serving in part to punish. U.S.C.A. Const.Amend. 8.

5. Criminal Law ⇐1214
Drugs and Narcotics ⇐191

Civil forfeiture of property used or intended to be used in drug offenses is "payment to a sovereign as punishment for some offense" and, therefore, is subject to excessive fines clause, even if forfeiture serves some remedial purpose. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(4, 7), 21 U.S.C.A. § 881(a)(4, 7); U.S.C.A. Const.Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

6. Federal Courts ⇐462

After Supreme Court held that excessive fines clause applied to civil forfeiture, prudence dictated that lower courts be allowed to consider in first instance whether forfeiture was excessive. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(4, 7), 21 U.S.C.A. § 881(a)(4, 7); U.S.C.A. Const.Amend. 8.

Syllabus *

After a state court sentenced petitioner Austin on his guilty plea to one count of possessing cocaine with intent to distribute in violation of South Dakota law, the United States filed an *in rem* action in Federal District Court against his mobile home and

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.