FRYE & SUGDEN VERSUS NEW YORK'S RULE PREVENTING THE DIRECT USE OF LEARNED TREATISES AT TRIAL: THE FACTS LOSE

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ABSTRACT

This article addresses three often incongruent New York aspects of evidence which, taken together, may impair the ability of a jury to effectively consider the merits of expert testimony: (1) The prohibition of the use of scientific literature at trial except on cross-examination, and then only if the expert recognizes the work as "authoritative;" (2) The professional reliability exception to the hearsay rule as a basis for expert opinion; and (3) The requirement that an expert demonstrate that the basis for an opinion is generally accepted within the applicable professional community.

The impact of these frequently contradictory rules can make it difficult for the finder of fact at trial to distinguish which of likely conflicting expert opinions is more credible. The paradox is that for an expert to give an opinion, they must demonstrate that it is based on generally accepted principles by presenting scientific literature. However, during the trial, the jury almost inevitably cannot consider this same literature and must assume that the expert's opinion is supported by it and well founded.

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In contrast to New York law, the approach of the overwhelming majority of states and embodied in Federal Rule of Evidence 803 (18), allows the direct use of professional literature. Adopting this widely recognized hearsay exception in New York would enable an expert to better establish a foundation for their opinion to the jury, and result in more sound and just outcomes.

INTRODUCTION: THE PROBLEM IN A NUTSHELL

Here are three often contradictory rules of evidence impacting expert testimony under current law in New York:

First, a scientific or medical expert may not express an opinion unless the basis for such opinion comports with generally accepted standards within the relevant professional community.[1] On a *Frye* motion, it is not enough for an expert to merely incant the "magic words" that their opinion is generally accepted. Rather, it is incumbent on the proponent of contested opinion testimony to produce scientific literature to support the contention that an opinion is based on generally accepted principles.[2] In the absence of such evidence, the opinion will be precluded.[3]

Second, an expert may properly base an opinion on materials commonly relied upon by professionals in that field.[4]

Third, at trial, however, use of scientific literature upon which an expert's testimony is based is prohibited during direct examination.[5] Such literature may only be utilized on cross-examination of an adverse expert, but then only if the witness recognizes it, in words or substance, as "authoritative."[6]

Accordingly, as a predicate to rendering an opinion, although an expert must demonstrate to the court that the opinion is based on generally accepted principles within the applicable profession by producing scientific literature to support that contention, in contrast, a *jury*

1. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); People v. Wesley, 633 N.E.2d 451, 454 (N.Y. 1994). In *Frye*, the court rejected evidence of supposed truthfulness based on blood pressure readings. *Frye,* 293 F. at 1014. *Wesley* was one of the early cases to accept DNA evidence. *Wesley,* 633 N.E.2d at 455. It would appear the acceptability of the science underlying each of these decisions has stood the test of time.

2. *See, e.g.,* People v. Williams, 147 N.E.3d 1131, 1139–40 (N.Y. 2020).

3. *See, e.g.,* Hooks v. Ct. St. Med., P.C., 790 N.Y.S.2d 679, 680 (App. Div. 2005).

4. *See, e.g.,* People v. Sugden, 323 N.E.2d 169, 172 (N.Y. 1974); *see also* FED. R. EVID. 703.

5. *See, e.g.,* Spensieri v. Laski*,* 94 N.Y.2d 231, 239 (N.Y. 1999).

6. *See id.*

hearing such opinion will *not* be allowed to consider the very literature upon which the expert's opinion is based and which supports it as sound. Therefore, unlike the court at a *Frye* hearing, under current New York law, at trial, the jury must simply assume—and not necessarily correctly—that any opinion which an expert renders is supported by the professional literature. Not only is this illogical, but it can lead to highly perverse and potentially unjust results.

I. THE RESTRICTED USE OF SCIENTIFIC LITERATURE AT TRIAL IN NEW YORK

As far back as 1896, it has been the rule in New York that a "learned treatise" is hearsay.[7] Such treatise or scientific literature may, therefore, only be used at trial solely on cross-examination, and then only if the witness recognizes the literature as "authoritative."[8] One would be hard pressed to find any other instance where an adverse witness under cross-examination during a trial can exercise complete control over what materials may or may not be used to attempt to undermine the validity or credibility of their testimony.

These restrictions on the use of learned treatises at trial are largely unique to New York. The overwhelming majority of jurisdictions in the United States, as well as the Federal Rules of Evidence recognize the direct authentication and use of professional literature as an exception to the hearsay rule. Accordingly, they permit it to be used as evidence in chief to support an opinion, as long as any qualified witness, including the party offering it, establishes it as reliable in that profession.[9]

The author has previously written about the standards necessary to establish that certain literature is sufficiently acknowledged by an adverse witness to permit its use during cross examination, even if the

7. *See* Egan v. Dry Dock, E.B. & B.R. Co., 42 N.Y.S. 188, 199–200 (App. Div. 1896).

8. *See id.*; *Spensieri,* 94 N.Y.2d at 239.

9. *See* Michael W. Kessler & Christine A. Caputo, *Appropriate Use of Scientific Literature at Trial in New York and Other Jurisdictions: Is "Authoritative" a Magic Word?,* 61 ALB. L. REV 181, 181 (1997) (noting that "[i]n the federal courts, and in a majority of states, the hearsay objection to the use of scientific literature has been abandoned."); Michael J. Hutter, *New York's Outlier Position Regarding the Evidentiary Uses of Learned Treatises: Time to Change?*, N.Y. L.J. (June 18, 2021, 12:00 PM), https://www.law.com/newyorklawjournal/2021/06/28/new-yorks-outlier-position-regarding-the-evidentiary-uses-of-learned-treatises-time-to-change/?slreturn=20230825180057.

witness does not use the "magic" word, "authoritative."[10] In summary, as the court noted in *Spiegel v. Levy*, an expert "could not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative."[11] The author's previous article postulated that New York's archaic rule led to less reliable expert testimony and proposed how the rule could be changed either through the common law or by statute.[12]

In his 2022 New York Law Journal article, Albany Law School Professor Michael Hutter addressed this topic, confirming that New York is one of only a small minority of states that prohibit the direct use of scientific literature even if an expert establishes that such literature is reliable.[13] Professor Hutter writes that the "vast majority of states have adopted rules that follow FRE 803(18) in total or with minor changes," and that Professor Wigmore, and other respected evidence commentators and trial attorneys, have long advocated the approach taken by the Federal Rule 803 of Evidence.[14] Federal Rule 803(18) provides that

> [a] statement contained in a treatise, periodical or pamphlet [is admissible] if (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
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> If admitted, the statement may be read into evidence but not received as an exhibit.[15]

Professor Hutter concluded that "[a]doption of the provisions of FRE 803(18) would be a progressive step forward," and it would place New York in step with the majority of states and, obviously, with the Federal Rules.[16]

Noted civil litigators Thomas Moore and Matthew Gaier's New York Law Journal article responded to Professor Hutter and opposed

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10. *See generally* Kessler & Caputo, *supra* note 9 (discussing cases where adverse witnesses refused to acknowledge that the scientific texts were "authoritative", but, based on language or testimony which in fact meant the same thing, many courts held that the scientific texts were nevertheless admissible for cross-examination).

11. Spiegel v. Levy, 607 N.Y.S.2d 344, 345 (App. Div. 1994).

12. *See* Kessler & Caputo, *supra* note 9, at 198–202.

13. *See* Hutter, *supra* note 9.

14. *Id.*

15. FED. R. EVID. 803(18).

16. Hutter, *supra* note 9.

allowing the direct use of scientific literature.[17] They argue that changing New York's longstanding rule in this manner is dangerous. Quoting from *Egan*, Moore and Gaier reiterate the hearsay basis for the New York rule, that "[t]here is no doubt that the contents of scientific books cannot be read to a jury for the purpose of proving the facts or establishing the deductions stated in them."[18]

Moore and Gaier based their opposition to direct use of scientific or medical literature on several interrelated grounds. First, they assert that such use would deprive the adverse party of effective cross examination because the author of the literature in question, as opposed to the expert relying on it, could not be questioned concerning "potential flaws in the manner in which the study was conducted . . . and the jury is deprived of the opportunity to assess the authors' credibility by observing their demeanor on the witness stand."[19] Second, there is a potential to "mislead" jurors, especially by "conferring an inaccurate imprimatur of credibility on an expert who cites [the literature]."[20] It is, they argue, especially harmful to the party with the burden of proof (usually the plaintiff). For example, where the plaintiff's "expert may not cite literature because none is on point, and the defense expert later cites material applicable to more general circumstances . . . the jury may still be swayed by the fact that this expert cited publications and the former expert did not."[21] Finally, the third ground for Moore and Gaier's concerns is that, especially in an atmosphere of medical malpractice litigation, there is a danger that some literature is created for the purpose of limiting the standard of care for professionals and then used to defend conduct.[22]

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17. Thomas A. Moore & Matthew Gaier, *Evidentiary Use of Learned Treatises*, N.Y.L.J. (Aug. 2, 2021, 2:00 PM), https://www.law.com/newyorklawjournal/2021/08/02/evidentiary-use-of-learned-treatises/.

18. *Id.* (citing Egan v. Dry Dock, E.B. & B.R. Co., 42 N.Y.S. 188, 199–200 (App. Div. 1896)).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* Moore & Gaier, *supra* note 17. Moore and Gaier cite *Lipschitz v. Stein*, 781 N.Y.S.2d 773 (App. Div. 2004) in support of their second proposition. In that case the Second Department held that it was improper under New York law for a defense expert in a medical malpractice case to testify to the fact that a failure to treat a patient immediately with antibiotics would not have made a difference in the plaintiff's outcome "because there are . . . essentially no properly done randomized or controlled comparison studies of the ethicacy [*sic*] of any of these preventative approaches in the literature." *Id.* at 776. The court wrote that "the introduction of such testimony on direct examination constitutes impermissible hearsay." *Id.* Query: Wouldn't this be important information for a jury to know? What if the shoe was on the other foot and the plaintiff's expert *could* cite studies supporting the contention

Though Moore and Gaier raise legitimate concerns, for the reasons discussed below, it is the author's opinion that continuation of the current limitations on the direct use of professional literature during a jury trial creates even more unfairness and is markedly inconsistent with other aspects of New York law concerning the bases for expert testimony.[23]

II. EVIDENCE OF MATERIALS COMMONLY RELIED UPON BY PROFESSIONALS IN THE FIELD AS A BASIS FOR EXPERT TESTIMONY

Both under the Federal Rules of Evidence and under New York law, it is the general rule that expert witnesses are entitled to base their opinions on "hearsay" material commonly relied upon by professionals in their field.[24] Rule 703 of the Federal Rules of Evidence provides that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.[25]

Federal Rule of Evidence 703 must be read in the context of Federal Rule of Evidence 803(18), cited earlier, which, as noted, specifically addresses the direct authentication and use of scientific literature. The commentary to Rule 703 recognizes that use of material commonly relied upon by professionals in a particular field that is otherwise inadmissible hearsay may, nevertheless, be relied upon by an expert in expressing an opinion. As the commentators to Rule 703 note,

> the rule is designed to broaden the basis for expert opinions . . . to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his

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that prompt antibiotic treatment improved the outcome and the defendant could not? Wouldn't that be important for the jury, and wouldn't the plaintiff's attorney want to be able to show it?

23. One would think that an inquiry pursuant to Section 3101(d) of the New York Civil Practice Law and Rules (CPLR) as to whether the witness relied on any studies or literature in forming an opinion, and if so to identify it, so that counsel could be prepared to address it would solve the concern. *See* N.Y. C.P.L.R. 3101(d) (MCKINNEY 2023).

24. *See generally* FED. R. EVID. 703 (allowing experts to base an opinion on facts or data in the case with materials that may be inadmissible hearsay in the federal system); *see also* People v. Sugden, 323 N.E.2d 169, 173 (N.Y.1974) (noting that "[t]he psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion.").

25. FED. R. EVID. 703.

> own practice bases his diagnosis on information from numerous sources and of considerable variety. . . . The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.[26]

New York law, as noted, applies the same rule with respect to permitting an expert to base an opinion on "material commonly relied upon" by experts in their own professional activities.[27] Thus, pursuant to *Sugden* and its progeny, experts have been permitted to utilize and base their opinions upon "materials commonly relied upon" by experts in many different and varied fields. These include, for example, physicians,[28] economists,[29] engineers,[30] psychologists,[31] life care planners,[32] construction cost estimators,[33] as well as appraisers of inventory and the value of services,[34] among other fields. As the Second Department wrote in *Moors v. Hall*:[35]

> [T]he fact that the plaintiff's expert, in evaluating the value of the plaintiff's domestic services, would necessarily depend upon official publications of statistics and other data which he had gathered, does not necessarily preclude the expert from testifying provided, *inter alia,* that the extraneous material "is

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26. FED. R. EVID. 703 advisory committee's note to 1972 proposed rules.

27. *See* Borden v. Brady*,* 461 N.Y.S.2d 497, 498 (App. Div. 1983) (Yesawich, J., concurring) (noting that the "[t]he Court of Appeals in *People v. Sugden* . . . declared that a medical expert 'may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion.' By permitting reliable but otherwise inadmissible data to serve as a basis for an expert's opinion, the court was harmonizing the New York law of evidence with the Federal rule now found in Rule 703 of the [Federal Rules of Evidence]. Reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay."). For an interesting analysis of the evolution and use of "professional reliability" evidence, especially in medical malpractice cases, see John Lyddane, *The Professional Reliability Exception to the Hearsay Rule, Part I,* N.Y. L. J. (Sept. 18, 2023) and *Part II* (Nov. 20, 2023).

28. *See* O'Brien v. Mbugua, 853 N.Y.S.2d 392, 394 (App. Div. 2008).

29. *See* Tassone v. Mid-Valley Oil Co.,773 N.Y.S.2d 744, 746–47 (App. Div. 2004).

30. *See* Matter of City of New York, 856 N.Y.S.2d 497, 497 (Sup. Ct. 2008).

31. *See* Matter of Greene v. Robarge, 962 N.Y.S.2d 470, 472 (App. Div. 2013).

32. *See* Tornatore v. Cohen, 78 N.Y.S.3d 542, 545–46 (App. Div. 2018).

33. *See* Caleb v. Sevenson Env't Servs., Inc., 984 N.Y.S.2d 749, 751 (App. Div. 2014).

34. *See* Generale Bank v. Bell Sec., Inc., 803 N.Y.S.2d 2, 3 (App. Div. 2005); Moors v. Hall, 532 N.Y.S.2d 412, 415 (App. Div. 1988).

35. *See Moors*, 532 N.Y.S.2d at 415 (articulating a reiteration of the "materials commonly relied upon" rule).

> of a kind accepted in the profession as reliable in forming a professional opinion."[36]

To be sure, some courts have imposed what appear to be arbitrary limitations on the use of materials commonly relied on by professionals in their everyday practice to make critical decisions. As the concurring opinion in *Borden* explained:

> The underlying rationale [of the exception to the hearsay rule permitting reliance on professional materials commonly relied upon] is that since physicians make life and death decisions in reliance upon medical reports filed by other doctors and medical personnel, those reports, though not independently admissible in evidence, enjoy a singular trustworthiness.[37]

Although it is only a trial level court decision, *Hornbrook v. Peak Resort*s, *Inc*. reveals the inconsistent, and often arbitrary manner, in which the *Sugden* rule may be applied.[38] In *Hornbrook,* the court refused to permit a non-treating expert physician testifying on behalf of the plaintiff to rely on reports of treating physicians — even though the exact same out of court reports would have been permitted to be relied upon by the plaintiff's treating doctors, and which the court tacitly acknowledged were, in fact, equally reliable.[39] The court reasoned that the distinction was that

> [w]here a treating doctor refers a patient to a consulting doctor for evaluation and the resulting report is used by the referring doctor in order to treat the patient, the reliability of the report is evident. Here, the out-of-court materials were generated by a series of treating doctors but were not used by the testifying doctor to treat the patient. Hence, it is not the reliability of the out-of-court materials that gives pause but the use to which these records and reports will be put by the testifying but non-treating expert.[40]

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36. *Id.* at 415 (quoting People v. Sugden, 323 N.E.2d 169, 173 (N.Y. 1974); Hambsch v. N.Y.C. Transit Auth., 469 N.E.2d 516, 518 (N.Y. 1984)).

37. Borden v. Brady, 461 N.Y.S.2d 497, 498 (App. Div. 1983) (Yesawich, J., concurring).

38. *See* Hornbrook v. Peak Resorts, Inc., 754 N.Y.S.2d 132, 134–36 (Sup. Ct. 2002).

39. *Id.*

40. *Id.* at 134. Of course, counsel might be able to avoid the problem posed by this case — even if treating physicians are less than cooperative — by authenticating the imaging pursuant to CPLR 4532-a and the certification of treating physicians' records as business records pursuant to CPLR 3122-a. *See* N.Y. C.P.L.R. 4532-a (MCKINNEY 2023); N.Y. C.P.L.R. 3122-a (MCKINNEY 2023).

Thus, even though the court concluded that the materials at issue met the *Sugden* "standard" of reliability, its use as a basis for opinion by a non-treating expert was rejected. It is difficult to understand why this distinction — in which each expert is using what is conceded to be "reliable" information for the basis of an opinion — should result in a different outcome.

In contrast to the *Hornbrook* dicta, *Wagman v. Bradshaw*, held, apparently in reliance upon the best evidence rule, that it was reversible error to allow a *treating* chiropractor who ordered an MRI in the course of his treatment of the plaintiff, to rely on a written report by the radiologist who had interpreted the imaging.[41] *O'Brien v. Mbugua* apparently came to the opposite conclusion.[42] The issue before the Third Department was "whether a *treating* physician may testify to the content of a nontestifying [sic] radiologist's report on an MRI which was ordered by the treating physician."[43] In allowing such testimony the court reasoned that

> [w]e conclude that where a treating physician orders an MRI — clearly a test routinely relied upon by neurologists in treating and diagnosing patients, like plaintiff, who are experiencing back pain — he or she should be permitted to testify how the results of that test bore on his or her diagnosis even where, as was apparently the case here, the results are contained in a report made by the nontestifying radiologist chosen by the treating physician to interpret and report based on the radiologist's assessment of the actual films. Significantly, this is not a case where the expert "essentially served as [a] conduit for the testimony of the report's author[]" by doing nothing more

41. Wagman v. Bradshaw, 739 N.Y.S.2d 421, 426 (App. Div. 2002). The court noted that CPLR 4532-a would allow the imaging itself into evidence if properly certified, but not the interpretive report by the radiologist, who undoubtedly had more expertise and was far more qualified to interpret the MRI. *Id.* at 424. By this rationale, in effect, the court is inviting a necessarily less qualified person, in this case a chiropractor, or perhaps a primary care physician, to interpret the imaging instead of a radiologist, who, by definition, is a medical specialist in this field. Confusing the issue even further, is the determination of the Court of Appeals in *Schozer v. William Penn Life Insurance Co. of New York*, 644 N.E.2d 1353, 1357 (N.Y. 1994). In that case the x-ray image itself could not be produced. Nevertheless, as an exception to the "best evidence rule," the Court permitted the admission of an x-ray *report*, despite the fact that interpretation of medical imaging is necessarily somewhat subjective and even highly qualified radiologists can, and often do, differ in their interpretations. *Id. Wagman* appears to be in direct conflict with *O'Brien*.

42. *See generally* O'Brien v. Mbugua, 853 N.Y.S.2d. 392 (App. Div. 2008) (allowing a treating physician to testify to the content of a non-testifying radiologist's report on an MRI which was ordered by the treating physician).

43. *Id.* at 393–94.

> than "dictating the report's contents" and, thus, exceeded the bounds of permissible opinion testimony. Instead, [the treating physician] rendered an opinion based not only on the MRI results, but also his physical examinations of plaintiff — where he identified muscle spasms in her lower and middle back — and her other medical records. Under these circumstances, we hold that the MRI report, which was ordered . . . in the course of his treatment of plaintiff and is of the type of information which [he] routinely relies upon in treating his patients, was "'merely. . . a link in the chain of data'" which assisted Danisi in forming his opinion and, thus, the testimony was properly admitted.[44]

In *Hambsch v. New York City Transit Authority*, the Court of Appeals affirmed the Second Department's reversal of a judgment for the plaintiff.[45] Although this issue was not preserved for appeal, the court's dicta noted that even where the plaintiff's treating physician personally reviewed the x-ray upon which his opinion was based, it was "error to permit the doctor's testimony without producing" the x-rays themselves.[46] The court opined that it was error to allow the physician to testify to his opinion that the plaintiff's condition was caused by a fracture, based on his "discussion . . . with a radiologist who held that opinion because of an unknown study that [the radiologist] did not participate in."[47] It is difficult to reconcile the different outcomes in these cases.

Experts inevitably arrive at opinions by applying their experience, knowledge, training, education — which are inevitably at least in part based on the literature of their profession — to the facts of a particular case. The expert in *Hambsch* would presumably have been prevented from citing what the Court of Appeals described as an "unknown study."[48]

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44. *Id.* at 394 (alterations in original).

45. Hambsch v. N.Y.C. Transit Auth., 469 N.E.2d 516, 518 (N.Y. 1984).

46. *Id.* at 517.

47. *Id.* As a matter of fact, treating physicians who work in emergency and urgent care settings, as well as many other areas of medicine, frequently rely on telephone and in-person communications from interpreting physicians or radiologists without a report. *See, e.g.,* AM. COLL. OF RADIOLOGY, ACR PRACTICE PARAMETER FOR COMMUNICATION OF DIAGNOSTIC IMAGING FINDINGS 5 (2020), https://www.acr.org/-/media/acr/files/practice-parameters/communicationdiag.pdf.

48. *Hambsch*, 469 N.E.2d at 517. In personal injury litigation, at least, this is not an issue that necessarily favors one side or the other. For example, in *Velez v. Svehla*, contrary to the plaintiff's claim his herniated disk was caused by the accident, the defense expert asserted that the plaintiff had a congenital back condition unrelated to the accident. Velez v. Svehla, 645 N.Y.S.2d 842, 843 (App. Div. 1996).

In *Wagman*, the court described the criteria for using information "commonly relied upon" as a basis for expert testimony:

> [I]n order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material" [*Hambsch*, 469 N.E.2d at 518]. Indeed, "reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay." [*Borden*, 461 N.Y.S.2d at 498 (Yesawich, J., concurring)].[49]

This logical statement that "once reliability is established," material may form part of the basis for an opinion, contradicts the seemingly artificial distinctions drawn in *Hornbrook*, *Wagman*, and *Hambsch*.

Cassidy v. Highrise Hoisting & Scaffolding, Inc. provides another example of the danger of an expert testifying to an opinion without establishing a professionally reliable basis for it:

> An expert's opinion should be disregarded where no authority, treatise, standard, building code, article or other corroborating evidence is cited to support the assertion concerning an alleged deviation from good and accepted industry custom and practice [*Buchholz v. Trump 767 Fifth Ave., L.L.C.*, 831 N.E.2d 960, 963–64 (N.Y. 2005)]. "Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place" [*Hotaling v. City of New York*, 866 N.Y.S.2d 117, 118–19 (App. Div. 2008), *aff'd*, 909 N.E.2d 577 (N.Y. 2009)].[50]

No one would argue about the need to establish the "reliability" of the out of court information at issue. Nor would anyone dispute that experts must have a sound professional basis for their opinions. However, given the constraints of the rule against the direct use of

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He based his opinion on his claim that 'the statistics show' that a very high percentage of completely asymptomatic individuals had findings similar to the plaintiff. *Id.* Citing *Sugden* and *Hambsch* and reversing a defense verdict, the court wrote that "the basis for the statistical testimony provided . . . was not revealed. Therefore, there was no indication that the testimony was reliable, and not mere speculation. Without an adequate foundation, that testimony was inadmissible." *Id.* Of course, had the expert tried to cite the literature upon which he was relying, it would have been barred by the rule against direct use of scientific literature discussed above.

49. Wagman v. Bradshaw, 739 N.Y.S.2d 421, 425 (App. Div. 2002).

50. Cassidy v. Highrise Hoisting & Scaffolding, Inc., 932 N.Y.S.2d 456, 458–59 (App. Div. 2011).

professional literature, counsel and the expert are caught in a "Catch-22," presented by the contradiction between *Sugden* and *Frye,* and the prohibition of direct use of scientific literature.[51]

Moreover, even when there is seemingly no real substantive dispute about the actual reliability or authenticity of the "material commonly relied upon by professionals," courts have imposed additional restrictions on the use of *Sugden* material. As noted in *O'Brien,* in order to qualify under *Sugden,* not only must the material be of the kind commonly relied upon in the field, but it must be only "a link in the chain"[52] in forming an opinion, rather than merely serving as a "conduit" to introduce otherwise inadmissible hearsay.[53]

In re State v. Floyd Y. is a complicated case that does not address the issue of the direct use of "hearsay" scientific literature by an expert to support an opinion.[54] However, in the context of a case involving the civil confinement of an alleged sex offender under Article 10 of the Mental Hygiene law, the Court of Appeals *was* confronted with the appropriate use of hearsay "commonly accepted by professionals."

An expert psychiatrist was permitted by the trial court to base her opinion on, among other things, "hearsay" victim accusations and police records of incidents of which the Respondent *had not been convicted, and, with respect to some, had even been acquitted*.[55] The expert testified that all of these records were "heavily relied upon in her profession," and the trial court allowed her to "inform the jury that she used those statements as the basis for her opinion."[56] Although the

51. A "Catch-22" is defined as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 (last visited Nov. 10, 2023).

52. *See, e.g.*, Anderson v. Dainack, 834 N.Y.S.2d 564, 566 (App. Div. 2007); State v. William F., 985 N.Y.S.2d 861, 864–65 (Sup. Ct. 2014); State v. J.A., 868 N.Y.S.2d 841, 847 (Sup. Ct. 2008). As the court wrote in *William F.*, "[t]he out-of-court material must not be the principal basis for the expert's opinion but rather a link in the chain of data upon which the [expert] relied." *William F.,* 985 N.Y.S.2d at 865.

53. *See, e.g.*, People v. Goldstein, 843 N.E.2d 727, 731 (N.Y. 2005) (citing Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991)), where, in *dicta,* the Court noted that "it can be argued that there should be at least some limit on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay.'"

54. *See generally* In re State v. Floyd Y., 2 N.E.3d 204 (N.Y. 2013) (addressing hearsay in the context of the "professional reliability" exception).

55. *Id.* at 206–07.

56. *Id.* at 208.

court majority concluded that it was improper to allow *some* of the materials relied upon, others might be appropriate under the "professional reliability," exception.

They wrote:

> [I]n many cases . . . the admission of the hearsay basis is crucial for juries to understand and evaluate an expert's opinion. An inflexible rule excluding all basis hearsay would undermine the truth-seeking function of . . . [a] jury by keeping hidden the foundation for an expert's opinion.
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> Contrary to our concurring colleagues' contention, basis hearsay does not come into evidence for its truth, but rather to assist the factfinder with its essential . . . task of evaluating the experts' opinions. In order to assess an expert's testimony, the factfinder must understand the expert's methodology and the practice in the expert's field.[57]

The Court of Appeals then stated that in order to admit the "hearsay" statements relied upon as the basis for the expert's opinion they must meet a two-pronged test:

> First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the "probative value in helping the jury evaluate the [expert's] opinion substantially outweighs [its] prejudicial effect" (*cf.* Fed. Rules Evid. rule 703). These reliability and substantial relevance requirements provide a necessary counterweight to the deference juries may accord hearsay evidence simply because an expert has propounded it. The requirements prevent an expert from serving as a passive conduit for hearsay yet allow the jury to evaluate expert opinions by considering reliable and probative evidence.[58]

Certainly, as discussed both above and below in the discussion of *Frye*, this conclusion by the Court of Appeals — that without hearing the basis for an expert's conclusion a jury factfinder cannot properly

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57. *Id.* at 212. How does this differ from allowing a jury to hear scientific literature supporting the expert's opinion "to assist the factfinder [in order to evaluate] the experts' opinions?" *Id.*; *see also id.* at 213 (observing approvingly the trial court's instructions to the jury that they should only "consider the out-of-court statements 'for the purpose of evaluating the experts' findings and understanding the basis of their conclusions.' The court also instructed the jury that it could reject an expert's opinion 'if after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion.' These instructions adequately informed the jury of its role as factfinder and the limited purpose of out-of-court statements introduced to help evaluate an expert's opinion.").

58. *Id.* at 213–14.

evaluate its validity — is precisely the argument to be made in support of the direct use of scientific literature as permitted under Federal Rule 803 and the vast majority of states.

III. ESTABLISHING GENERAL ACCEPTANCE UNDER *FRYE*

As noted above, for an expert to be permitted to express opinion testimony in New York, it must be established that the expert's methodology opinion is in accordance with generally accepted standards within the relevant professional community.[59]

Under New York law, the opinion of a proposed expert, as well as the basis for such expert's opinion, must be disclosed.[60] A party may seek to preclude such opinion by asserting that it does not meet the *Frye* standard, *i.e*., it is not generally accepted within the relevant professional community.[61] This may occur by objection at trial or, more likely, in a pre-trial *Frye* motion where it is likely an evidentiary hearing will occur.

The party seeking to preclude an expert on *Frye* grounds bears the initial burden of making "a *prima facie* showing that it is a novel theory which is not generally accepted." [62] Once that threshold is met,

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59. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); People v. Wesley*,* 633 N.E.2d 451, 454 (N.Y. 1994). In the federal courts, and in most jurisdictions, the *Frye* standard has been replaced by the *Daubert* test for expert testimony admissibility. *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (adopting a four-factor test to determine whether the methodology underlying the proposed expert testimony is scientifically valid and whether that methodology properly can be applied to the facts of a case). It is beyond the scope of this Article to analyze the differences between these two standards. In large measure, this is because jurisdictions that apply *Daubert*, in general, do not restrict the direct use of learned treatises in support of expert opinions.

60. *See* N.Y. C.P.L.R. 3101(d) (MCKINNEY 2023).

61. *Frye*, 293 F. at 1014.

62. Santos v. State Farm Fire & Cas. Co., 905 N.Y.S.2d 497, 498 (Sup. Ct. 2010) (citing In re Seventh Jud. Dist. Asbestos Litig*.,* 797 N.Y.S.2d 743, 748 (Sup. Ct. 2005)). *Santos* involved a determination as to whether the defense fire reconstruction expert could express an opinion based on "the results of computer fire modeling . . . to determine the origin and cause of a fire . . . ." *Id.* The court precluded such testimony, finding that there was insufficient evidence "*in the fire investigation community* that computer fire modeling is generally accepted as reliable." *Id.* at 501 (emphasis added). However, the court added that "[a]lthough defendant's expert may support a case for the acceptance of computer fire modeling in the *regulatory/design community*, he does not support a conclusion that it is generally accepted in the *fire investigation community*." *Id.* (emphasis added). Although one might question whether the court's finding in *Santos* is a distinction without a difference, this case highlights the need to identify the relevant professional community at issue. For example, perhaps a medical treatment or test may not be fully accepted by the FDA for regulatory purposes but has been widely and successfully used "off label" by

the court will inquire as to whether the proposed opinion meets the *Frye* standard of being generally accepted in the relevant professional community.

Whether the *Frye* issue is decided solely on motion papers[63] or at an evidentiary hearing, the party seeking to admit the expert opinion must provide scientific evidence, usually in the form of professional literature, to support a conclusion that the opinion is generally accepted in the relevant community.[64] The Court of Appeals has held that *Frye* does not require that the opinion be a majority of the community, but rather merely that it be "generally acceptable."[65] Without a showing of general acceptance, an opinion will not be permitted. For example, as noted above, in *Cassidy v. Highrise Hoisting & Scaffolding, Inc.*, the First Department affirmed preclusion of testimony from a "safety expert" concerning a claimed "industry standard" because there was nothing, such as building code or article to support the expert's contention that there were commonly accepted standard practices in its industry.[66]

Similarly, in *Hooks v. Court Street Medical, P.C.*,[67] the Second Department affirmed preclusion of a physician's testimony on causation:

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practicing physicians for decades. Which would be the relevant scientific community for *Frye* purposes? *See Wesley*, 633 N.E.2d at 463 (Kaye, C.J., concurring) (noting that "[i]n defining the relevant scientific field, the court must seek to comply with the *Frye* objective of containing a consensus of the scientific community. If the field is too narrowly defined, the judgment of the scientific community will devolve into the opinion of a few experts. The field must still include scientists who would be expected to be familiar with the particular use of the evidence at issue, however, whether through actual or theoretical research.").

63. *See*, *e.g.*, Lahey v. Kelly, 518 N.E.2d 924, 929 (N.Y. 1987) (observing that "[t]he court may find scientific tests reliable based on the general acceptance of the procedures as shown through legal writings and judicial opinion."); People v. Middleton, 429 N.E.2d 100, 104 (N.Y. 1981) (ruling that a judge is not required to hold a "hearing concerning the scientific principles involved" to determine whether the evidence is generally reliable).

64. Cassidy v. Highrise Hoisting & Scaffolding, Inc., 932 N.Y.S.2d 456, 458–59 (App. Div. 2011).

65. *Wesley*, 633 N.E.2d at 454 (citing *Middleton*, 429 N.E.2d at 103). In *Wesley*, when citing to *Middleton*, it was specifically noted that the particular opinion "need not be 'unanimously indorsed' by the scientific community but must be 'generally acceptable as reliable.'" *Id.* In her concurring opinion, Chief Judge Kaye reiterated that *Frye*, "emphasizes 'counting scientists' votes, rather than on verifying the soundness of a scientific conclusion.'" *Wesley*, 633 N.E.2d at 464 (Kaye, C.J., concurring) (citing Jones v. United States, 548 A.2d 35, 42 (D.C. 1988).

66. *Cassidy*, 932 N.Y.S.2d at 458–59.

67. Hooks v. Ct. St. Med., P.C., 790 N.Y.S.2d 679, 680 (App. Div. 2005).

> The plaintiff's expert's opinion was based primarily upon the fact that the plaintiff only exhibited symptoms after the alleged malpractice occurred. In addition, the expert could cite to no relevant scientific data or studies showing a causal link between the misuse of an electric muscle-stimulating unit and glossopharyngeal neuralgia, and he could cite to no instance when this type of injury had previously occurred in this manner.[68]

In *Selig v. Pfizer, Inc.,*[69] expert testimony of an alleged causal relationship between Viagra and heart attacks was precluded in the absence of sufficient supporting scientific literature:

> In the absence of any clinical data supporting their expert's theory that there is a causal link between the use of the drug Viagra and heart attacks in men with preexisting coronary artery disease, it was incumbent upon plaintiffs to set forth other scientific evidence based on accepted principles showing such a causal link.[70]

An interesting contrast to *Selig* is the First Department's decision in *Marsh v. Smyth*, especially the concurring opinion by Justice Saxe, which gives a detailed explanation of the proper, and limited, role of *Frye* in establishing causation in medical malpractice cases.[71] The court in *Marsh* reversed the determination of the trial court which precluded testimony of the plaintiff's expert physicians to the effect that "hyperabduction" of the plaintiff's arm during surgery was the cause of her nerve injury.[72] The plaintiff submitted medical literature which referred generally to malpositioning as a potential cause for nerve injury.[73] Such literature, however, did not specifically refer to

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68. *Id.* Though the underlying facts are not disclosed, could the plaintiff in this case have properly relied on *res ipsa locquitur*? *See, e.g.*, States v. Lourdes Hosp. 792 N.E.2d 151, 152–53 (N.Y. 2003) (noting that in a case of alleged hyperabduction of the arm during surgery, the causation would be implied from the injury itself, i.e. *res ipsa*). The Court there held that while "factually simple medical malpractice cases requir[ing] no expert" can fall under *res ipsa*, if a plaintiff is trying to meet the elements of *res ipsa*, the jury should be allowed to hear the plaintiff's "experts in order to determine whether [the] injury would normally occur in the absence of negligence.").

69. Selig v. Pfizer, Inc., 735 N.Y.S.2d 549, 550–51 (App. Div. 2002).

70. *Id*. at 551.

71. *See generally* Marsh v. Smyth, 785 N.Y.S.2d 440 (App. Div. 2004) (emphasizing that it is not the court's job to determine which expert's conclusion is correct or whether the method used by the expert is reliable, but rather, whether there was consensus in the scientific community as to the method's reliability.)

72. *Id.* at 441–42 (citing *States*, 792 N.E.2d at 152–53, in holding that the jury should be allowed to consider *res ipsa loquitur*).

73. *Id.* at 443 (Saxe, J., concurring).

"hyperabduction" as a cause of injury to the "long thoracic nerve," but rather injury only to the bracheal plexus.[74] The trial court ruled that this was insufficient to meet *Frye* even though, as Justice Saxe notes, this was at most a difference of opinion as to whether the long thoracic nerve was part of the bracheal plexus; not a "novel" theory necessary to invoke *Frye* in the first place.[75] Justice Saxe explained what the applicable *Frye* standard should be:

> [T]he question of whether the challenged testimony is admissible should not involve weighing the number of experts that concur in the expert's opinion against the number that do not, or independently deciding on the soundness of the competing experts' views. Rather, the challenge should only be successful where the challenged theory of causation finds no objective support, but instead is based solely upon the expert's own unsupported beliefs. Accordingly, the court's concern must be limited to making sure that within the scientific field in question, there is a substantive, demonstrable, objective basis for the expert's conclusion. The appropriate question for the court at such a hearing is the somewhat limited question of whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff's situation, or whether, instead, it is "connected to existing data only by the *ipse dixit* of the expert" [Gen. Elec. Co. v Joiner, 522 U.S. 136, 146 (1997)].
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> The focus of the inquiry in such an instance should not be upon how widespread the theory's acceptance is but should instead consider whether a reasonable quantum of legitimate support

74. *Id.* (Saxe, J., concurring).

75. *Id.* at 444–45 (Saxe, J., concurring) (observing that "testimony as to whether the asserted conduct of the defendants was the causative agent for the plaintiff's injury does not really involve anything novel or experimental as contemplated by the *Frye* test. Rather, it is exactly that which is often the primary point of contention in a personal injury action, where the plaintiff offers an opinion that the defendant's conduct caused the injury, and the defendant denies any such conduct and counters that the injury resulted from some other causative agent, unrelated to defendant. Such expert testimony simply does not warrant a preliminary *Frye*-type hearing . . . . [and] unlike a newly developed test or process, a theory about the mechanism of an injury will not prompt the profession generally to weigh in with its own studies or publications on the subject."). *Id.*; *see also* Nonnon v. City of New York, 819 N.Y.S.2d 705, 717 (App. Div. 2006) (holding that epidemiologic studies made in accordance with accepted standards are not novel, and accordingly, a *Frye* determination is not required). Indeed, many, if not most, current principles of medicine and science are widely accepted as axiomatic or naturally flow from such axiomatic principles, e.g., unsterile conditions are a cause of infection, or a lack of oxygen or blood flow can cause serious injuries, such that a *Frye* hearing would be absurd in the setting of an opinion based on these principles.

> exists in the literature for the expert's views. Nor is it necessary, as the motion court seems to have believed, that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert.[76]

Marsh, however, was a case involving the proper application of *Frye.* It was not a case in which the court abandoned the idea that sufficiently relevant scientific literature is necessary to avoid preclusion under *Frye.* Rather, Justice Saxe reinforced that requirement saying, "It is important to note that in many of this Court's recent cases employing the *Frye* procedure to preliminarily rule on the admissibility of proposed expert testimony regarding causation, *preclusion rulings have been based upon a complete absence of literature or studies supporting the claim*."[77]

Even where the expert physician giving an opinion used an appropriate methodology that is a universally accepted principle of medicine, such as the use of a differential diagnosis, it may be subject to *Frye* and will not be accepted in the absence of supporting literature establishing general acceptance.[78] In *Marso v. Novak,*[79] the plaintiff's expert asserted that the defendant's failure to address the plaintiff's bradycardia (low heart rate) was causally related to his stroke, arriving at this conclusion by use of a differential diagnosis which eliminated other possible likely causes.[80]

Thus, the court held that even though the differential diagnosis process as a methodology is universally accepted in the medical

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76. *Marsh*, 785 N.Y.S.2d at 445 (Saxe, J., concurring).

77. *Id.* (Saxe, J., concurring) (emphasis added).

78. Jesse Klein, *What is a Differential Diagnosis*, MED. NEWS TODAY (July 15, 2020), https://www.medicalnewstoday.com/articles/differential-diagnosis ("Differential diagnosis refers to a list of possible conditions that may be causing a person's symptoms. . . . A differential diagnostic approach may be necessary in cases where there is more than one potential cause of a person's symptoms. . . . [I]t is a rational and systematic approach that can allow a doctor to correctly pinpoint the underlying cause of a person's symptoms.").

79. Marso v. Novak*,* 840 N.Y.S.2d 53, 54 (App. Div. 2007).

80. The findings of the treating physicians in *Marso*, presumably written in a hospital record, were that the stroke was the result of bradycardia. *Id.* It is unclear why this was not admissible, and sufficient by itself to establish causation, as well as to support the expert's conclusion. *See* N.Y. C.P.L.R. 4518 (MCKINNEY 2023) (which establishes the admissibility of hospital records as business records).

profession, the conclusion of causation is not necessarily so.[81] Quoting from the concurring opinion in *Styles v. General Motors Corp*.,[82] the court reminded that "(t)he *Frye* 'general acceptance' test is intended to 'protect juries from being misled by expert opinions that may be couched in formidable scientific terminology but that are based on fanciful theories.'"[83]

Although the court may or may not have been correct in its determination in *Marsh v. Novak* under the particular circumstances of that case, such will not always be the case in the use of the diagnostic process and the proper use of a differential diagnosis. There are many instances in which a "diagnosis of exclusion" is widely, if not universally, accepted in the field of medicine, *i.e.,* when every other possibility is ruled out, the likely diagnosis is what condition remains.[84] One researcher described his study of the diagnoses of exclusion, and their relatively common use in in medical practice:

> I found and reviewed 20 acceptable articles on the subject [of diagnosis of exclusion]. . . . They crossed 10 specialties and covered the following 19 disorders: adult-onset Still's disease, panic attack, diastolic heart failure, takotsubo cardiomyopathy in liver-transplant patients, Bell's palsy, anorexia tardive, phantom tooth pain, Alzheimer's disease, nonfatal amniotic fluid embolism, hysterical stridor, primary angiitis of the central nervous system, functional vision loss, irritable bowel syndrome, psychogenic cough, hypertensive encephalopathy, chronic bronchitis, pyoderma gangrenosum, trochanteric bursitis, and chronic idiopathic angioedema–urticaria. Although additional pertinent material undoubtedly exists, these articles were enough to convince me that a [diagnosis of exclusion] is definitely important and relatively common.[85]

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81. *Marso*, 840 N.Y.S.2d at 55 ("To accept plaintiff's 'methodology-only, ignore-the-conclusion' approach would circumvent the rationale for the *Frye* doctrine. . . . [I]t is plaintiff's burden to show that his or her expert's *theory* is generally accepted in the relevant community.").

82. Styles v. Gen. Motors Corp., 799 N.Y.S.2d 38, 43 (App. Div. 2005) (Friedman & Catterson, JJ., concurring).

83. *Marso*, 840 N.Y.S.2d at 55 (citing *Styles*, 799 N.Y.S.2d at 43 (Friedman & Catterson, JJ., concurring)).

84. As a matter of logical thinking, diagnosis of exclusion is, as Sherlock Holmes stated, "when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth[.]" *See* ARTHUR CONAN DOYLE, SIGN OF THE FOUR 111 (1890).

85. *See*, *e.g.*, Herbert L. Fred, *The Diagnosis of Exclusion: An Ongoing Uncertainty*, 40 TEX. HEART INST. J. 379, 379–80 (2013).

Diagnosis of exclusion is true in other areas, such as psychiatry, as well. For example, a conversion disorder

> is a disorder in which a person experiences blindness, paralysis, or other symptoms affecting the nervous system that cannot be explained solely by a physical illness or injury. . . . Diagnosis of Conversion disorder is based on identifying particular signs that are common among people with the disorder, as well as performing tests to rule out other causes of the symptoms.[86]

In other words, the very definition of a well-recognized and "generally accepted" psychiatric disorder requires that there be no medical explanation for the patient's condition. Thus, the absence of literature supporting a particular diagnostic cause does not necessarily negate the fact that it is, indeed, generally accepted, and should not, in and of itself, be a legal reason for precluding testimony.

It will be recalled that *Wesley* involved the Court of Appeals approving what was then "new" DNA technology in evidence in a criminal case as meeting the *Frye* standard of acceptance.[87] In her concurring decision, Chief Judge Kaye noted that "[o]nce a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered. Courts thereafter may take judicial notice of reliability of the general procedure."[88] This is in accord with the general principle that precedent of the Court of Appeals and the Appellate Division is binding on the lower courts as a matter of law.[89] For example, when seeking to introduce an x-ray to prove a

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86. *Conversion Disorder – Disease at a Glance,* GENETIC & RARE DISEASES INFO. CTR., https://rarediseases.info.nih.gov/diseases/6191/conversion-disorder (last visited Nov. 12, 2023). The *Diagnostic and Statistical Manual of Mental Disorders*, *5th edition (DSM-5)* requires, among other things that "[c]linical findings can provide evidence of incompatibility between the symptom and recognized neurological or medical conditions" and that "[a]nother medical or mental disorder does not better explain the symptom or deficit." Jessica L. Peeling & Maria Rosaria Muzio, *Conversion Disorder*, NAT'L LIBR. OF MED. (May 8, 2023) (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013), https://www.ncbi.nlm.nih.gov/books/NBK551567/; *see also, e.g.*, Richard J. Brown & Roberto Lewis-Fernández, *Culture and Conversion Disorder: Implications for DSM-5*, 74 PSYCHIATRY 187, 187 (2011).

87. People v. Wesley, 633 N.E.2d 451, 455 (N.Y. 1994).

88. *Id.* at 462 (Kaye, C.J., concurring).

89. MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, BOOK 1, STATUTES, §72(b), cmt. (1971). The Comment to that section states " . . . the decisions of the Court of Appeals are binding upon the Appellate Division; those of the Appellate Division on the Supreme Court; and so on down from the superior to the inferior judicatories." *See also, e.g.,* D'Alessandro v. Carro, 992 N.Y.S.2d 520, 523 (App. Div. 2014) ("It is axiomatic that Supreme Court is bound to apply the law as

fracture, there is no need to go back to establish general acceptance of the proposition that x-rays can show broken bones.

However, where it is claimed that the "science" has changed after the Appellate court has ruled on a *Frye* issue, a court may decide to ignore the prior precedent, notwithstanding the rule of binding precedent. When that occurs, a *Frye* hearing may still be ordered.[90]

It is important, therefore, that counsel confronted with a *Frye* hearing be must be fully versed in, and effectively utilize, both the literature used to support admissibility, and that which seeks to exclude it. Unfortunately, for the reasons described above, under current New York law, the opportunity to meaningfully use such literature at trial does not exist.

CONCLUSION: ATTEMPTING TO RECONCILE THESE RULES

In summary, under current New York law, an expert may base an opinion, in part, on material commonly relied upon by professionals

promulgated by the Appellate Division within its particular Judicial Department and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals.").

90. An interesting example of this scenario is a comparison of three cases concerning the admissibility of diffusion tensor (DTI) MRI (a radiographic methodology to show brain white matter damage that is too small to be seen on traditional MRI). In 2008, the First Department affirmed the trial court's finding that DTI met the *Frye* standard and the experts' testimony relying on it was proper. *See* LaMasa v. Bachman, No. 129996/93, 2005 N.Y. Slip Op. 50882(U), at 3 (Sup. Ct. N.Y. Cty. Apr. 13, 2005), *aff'd*, 869 N.Y.S.2d 17, 18 (App. Div. 2008) (holding thar that "while some of plaintiffs' experts relied on new technology or methodologies [DTI], the same experts also opined based on well-established and recognized diagnostic tools, and we find that they provided reliable causation opinion."). Ten years later, however, notwithstanding *LaMasa*, the Suffolk County Supreme Court held a *Frye* hearing based on a claim that a "white paper" published in 2014 questioned the reliability of DTI. *See* Brouard v. Convery, 70 N.Y.S.3d 820, 822–23 (Sup. Ct. 2018) (precluding DTI testimony based on the "white paper" which made "it clear that DTI technology is not generally accepted as yet in the field of neurology for use in the clinical treatment of individual patients."). The issue was revisited again, however, in 2022. *See* Lee v. Troge, No. 50958/18, 2022 N.Y. Slip Op. 50119(U), at 1 (Sup. Ct. Dutchess Cty. Feb. 22, 2022) (finding that "DTI is generally accepted in the medical community as a reliable tool for diagnosing head injury in individual patients."). In *Lee*, the court criticized the reliability of the "White Paper" upon which *Brouard* relied. *See id.* at 2–3 (noting that the "White Paper is not peer reviewed, and has only met two of the twenty-seven items on the requisite checklist [to qualify as peer reviewed]. One of the reasons was that *the White Paper failed to mention at least thirty other papers which should have been considered and discussed as they were the opposite of what the 'White Paper' said*. . . . [T]he "White Paper" is not a scientific paper and that 'endorsement' is something that is not used for peer review but rather is used for marketing." (emphasis added)).

in that field. If challenged, that testimony will not be admissible unless it can be demonstrated to the court that there is literature to support the contention that an opinion is within the bounds of general acceptance in the relevant professional field.

However, under the rules preventing the direct use of scientific literature, once the court makes a threshold *Frye* determination that the basis for an opinion is generally accepted in the expert's profession, the jury is prohibited from considering the very literature upon which acceptability was found — unless, that is, in the extraordinarily rare instance where an adverse witness is willing to concede that such literature is "authoritative."[91] There is no logical reason why this should be the case. It is the legal equivalent of an attorney arguing a point of law to a court but being prevented from citing specific case law to support their position unless the opposing attorney agrees that it is controlling.

Before an expert can testify, a court has either ruled that the legal basis for an opinion is scientifically sound under *Frye*, or that there is no controversy about its general acceptance. In either instance the jury should be entitled to know that when an expert is expressing an opinion, that there is or is not a solid foundation for that opinion.

The concept of "general acceptance" in evaluating likely contradictory expert opinions at trial is equally as important as is the gatekeeping function of the court in ruling on admissibility — if not more so. Otherwise, there is a danger that the finder of fact will base its decisions on which expert is more glib in expressing an opinion, rather than evaluating how much credence should be given to the substance of their testimony.

The solution to this contradiction lies not necessarily in changing the showing required under *Frye* or by limiting use of "material commonly relied upon" by professionals in their daily work, but rather in joining the federal courts and the vast majority of states in allowing the direct substantive use of learned treatises or literature supporting an opinion. Is it really too much to ask that an expert expressing an opinion in court "show their work," and shouldn't we want them to do so?

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91. The fact finder is not necessarily a jury. In a bench trial such as those in the Court of Claims or otherwise, it may be the same judge who considered the literature in determining a *Frye* motion who is conducting the trial and acting as the finder of fact. In hearing the expert testimony at trial, is the judge then obligated to "forget" the literature that was necessarily reviewed previously in determining admissibility? Is the judge entitled to rely on such literature in rendering a finding of fact? And, if the judge can consider it, why shouldn't a jury be able to do so?