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## Expert Testimony Needs Judges to Act as “Gatekeepers”: The Maryland Court of Appeals Teaches Why

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The law of evidence has many rules to help guide a jury or other trier of fact to reach a just result. Lay witnesses must confine their testimony to matters within their own personal knowledge. Hearsay, generally speaking, is not permitted. Evidence must be directly relevant to the issues before the court, and overly prejudicial evidence must be excluded. Judges who do their best handling the hundreds of evidentiary issues that may arise in a case can still make a mistake in the heat of trial. But errors in any of these areas are usually not fatal to the truth being determined by a jury. In one area, however, the failure to apply evidentiary rules faithfully can often prove outcome determinative: the admission of expert evidence.

Allowing an expert to testify when that expert’s testimony is not firmly grounded in science or another technological field can mean the difference between an innocent person being found guilty of a crime or an individual or business being subject to civil liability for harm that the person or entity did not cause. There have been thousands of cases and scores of articles regarding the standards judges should apply in deciding whether to admit expert evidence given these high stakes. The distinguished Federal Rules Standing Committee on Rules of Practice and Procedure is presently considering whether to amend Federal Rule of Evidence 702, which addresses the admissibility of expert evidence, to make clear that a proffered expert’s methodology, as well as the expert’s conclusions, must be reliable before that expert’s testimony can be presented to a jury.<sup>1</sup>

Despite regular discussion of the subject of expert testimony, it remains relatively rare to find a judicial opinion that thoroughly analyzes and sets forth clear guidelines for trial judges regarding the admissibility of expert evidence. In

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<sup>1</sup> See Rules & Policies, U.S. Courts, at <https://www.uscourts.gov/rules-policies> (providing status of Federal Rule Advisory Committee consideration of proposed rule amendments, including Federal Rule of Evidence 702).

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August 2020, the Maryland Court of Appeals, the state’s highest court, rendered such a ruling in *Rochkind v. Stevenson*.<sup>2</sup> The opinion is one of the best explanations as to why expert testimony requires judges to act as “gatekeepers” against the admission of unreliable expert evidence.

As co-author of a torts casebook, what struck me about the *Rochkind* decision is that it is a textbook opinion for trial judges: it teaches as well as decides. The court explained with clarity why it abandoned a flawed, antiquated standard based on the so-called “Frye rule” in favor of the more rigorous “Daubert rule” applied in federal courts and most other states. In doing so, Maryland’s high court instructed judges to serve as “gatekeepers” to assure that only sound and reliable expert evidence is considered by juries.

*Rochkind* involved the issue of whether an adult woman’s Attention Deficit Hyperactivity Disorder (ADHD) was caused by childhood exposure to lead paint. She sued the landlord of an apartment where she had lived during infancy, claiming exposure to lead as opposed to other factors such as a family history of learning disabilities caused her to develop ADHD and other cognitive disorders.<sup>3</sup> At trial, she sought to prove a causal connection through expert testimony.<sup>4</sup> The landlord challenged the reliability of the proposed expert’s causation analysis and conclusions, setting the stage for the state high court to consider adopting the Daubert standard.

## 1 ABCs of Evidence Law

To fully appreciate the wisdom and importance of the court’s decision in *Rochkind*, it is helpful to recall the fundamentals of evidence law. As stated in the introduction, under evidence rules, laypersons are permitted to give firsthand testimony within their direct knowledge and experience. A jury can evaluate that testimony based on each juror’s own background and experience. For example, if a witness saw a car accident, he or she can testify as to whether a driver went through a red light. On the other hand, if a question arises as to whether a defect existed in the car’s brakes, expert testimony would be needed because the jury cannot answer that question through the jurors’ knowledge and experience.

The question then arises as to how a layperson jury can evaluate the reliability of an expert’s testimony on a topic about which the jury knows little or nothing. Adding to this challenge of evaluating an expert is the fact that expert witnesses

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<sup>2</sup> 2020 WL 5085877 (Md. Aug. 28, 2020).

<sup>3</sup> See *id.* at \*2.

<sup>4</sup> See *id.* at \*2–4 (discussing how the case ultimately involved four separate trials).

have extraordinary witness powers that lay witnesses do not. An expert witness can rely on hearsay (e.g. things read in a book or report, or heard in a lecture) and can testify as to conclusions (e.g. “the braking system is defective”). Lay witnesses cannot testify as to the ultimate issues in a case; they must leave that job to the jury.

These basic functions of expert witnesses underscore why it is so critical that judges act as “gatekeepers” against unreliable scientific evidence. Many proposed expert witnesses have exceptional credentials (e.g. Ivy League education) in a relevant field, but may nevertheless put forth testimony that is not based on sound science. As a result, layperson jurors or other factfinders may be misled as to the true nature of scientific support for a proposition, for example, whether a certain amount of lead exposure may cause ADHD or other disorders.

## 2 Key Aspects of *Rochkind* Decision and Trial Judges’ “Gatekeeper” Role

### 2.1 *Daubert* Versus *Frye* Expert Evidence Rules

For the past half-century, Maryland had followed a version of the *Frye* rule in determining the admissibility of expert evidence. This standard centered on whether scientific evidence is “generally accepted” in a relevant scientific community, which is an approach Maryland’s high court recognized can produce inconsistent results.

As the court explained, the *Frye* rule can be over inclusive in allowing a jury to hear evidence of any “generally accepted” scientific principle or methodology, even if it reflects unreliable science.<sup>5</sup> For example, it was “generally accepted” for centuries in the scientific community that the Sun rotated around the Earth until Copernicus debunked that scientific theory. At the same time, the *Frye* rule can be under inclusive in disallowing reliable scientific evidence that has not yet obtained general acceptance in the scientific community.<sup>6</sup> For example, many scientists once believed that the conditions of space precluded sending a person to the moon and back until NASA proved otherwise.

In 1993, the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>7</sup> recognized the shortcomings of the *Frye* rule and replaced this evidentiary standard. It did so in the context of interpreting Federal Rule of Evidence 702,

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<sup>5</sup> See *id.* at \*14.

<sup>6</sup> See *id.* at \*15.

<sup>7</sup> 509 U.S. 579 (1993).

which is similar to Maryland's expert evidence rule.<sup>8</sup> The Daubert rule refocused attention away from general acceptance of a given methodology to the reliability of the methodology used to reach a particular result.

The *Daubert* case itself involved “experts” who possessed strong academic credentials, yet were testifying on speculative science that a drug (i.e. Bendectin<sup>®</sup>) used to treat severe morning sickness caused birth defects. The manufacturer of Bendectin<sup>®</sup> was subject to hundreds of lawsuits in spite of all available epidemiological evidence showing the drug did not cause birth defects.<sup>9</sup> The Food and Drug Administration (FDA) focused on the sound science and continued to approve Bendectin<sup>®</sup> as safe and effective. Nevertheless, the manufacturer pulled the drug from the market because of the litigation. As a result, many pregnant women suffering from severe morning sickness were deprived for decades of a safe and effective treatment.

The Supreme Court's decision to abandon the Frye rule came too late for the makers of Bendectin<sup>®</sup>, but the ruling ushered in major changes to courts' evaluation of expert evidence. “Expert evidence,” the Court appreciated, “can be both powerful and quite misleading because of the difficulty in evaluating it,” which requires judges to 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.”<sup>10</sup> This approach, which has come to be known as the Daubert rule, recognized “a gate-keeping role for the judge” to prevent the admission of unreliable expert evidence.<sup>11</sup>

## 2.2 *Rochkind* Explains Why State Courts Should Embrace *Daubert*

In *Rochkind*, the Maryland Court of Appeals stated that the “impetus behind our decision to adopt *Daubert* is our desire to refine the analytical focus when a court is faced with admitting or excluding expert testimony.”<sup>12</sup> The court explained that this analysis “becomes especially important in modern society, which routinely

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<sup>8</sup> See *id.* at 588-92; Md. Rule 5-702.

<sup>9</sup> See Victor E. Schwartz & Christopher E. Appel, *Roundup Cases May Be a New Example of an Old Problem: The Post Hoc Fallacy*, 34:11, Legal Backgrounder (Wash. Legal Found. Aug. 9, 2019) (discussing Bendectin<sup>®</sup> litigation).

<sup>10</sup> *Daubert*, 509 U.S. at 593-94, 595 (quotation omitted).

<sup>11</sup> *Id.* at 597.

<sup>12</sup> 2020 WL 5085877, at \*14.

confronts emerging technologies that challenge the efficacy of *Frye*.<sup>13</sup> The Daubert rule (and its subsequent incorporation into Federal Rule of Evidence 702), by comparison, establishes factors to “provide guidance on how to determine if scientific reasoning is, indeed, sound, or a scientific theory adequately justifies an expert’s conclusion.”<sup>14</sup> Judges must consider whether a theory or technique can be (or has been) tested or subjected to peer review, whether a particular scientific technique has a known or potential rate of error, and the existence and maintenance of standards and controls, among other factors.<sup>15</sup>

Unreliable scientific evidence, such as fringe theories that an exposure to a product or substance caused a specific disease in spite of no scientific support, is no longer simply presented to a jury to weigh and make a decision. Again, this is an important change because layperson jurors may not fully appreciate how novel and unscientific the “expert” testimony actually is within a relevant subject area.

In adopting Daubert, Maryland’s high court additionally made clear that a judge’s gatekeeping role is not to determine whether a proposed expert is “right” or “wrong” in their testimony. Rather, the standard is whether the expert’s testimony is adequately grounded in reliable and sound science, and that there is not “too great an analytical gap” between the expert’s methodology and conclusions.<sup>16</sup>

Further, the court recognized that the more demanding Daubert rule has worked well in the federal courts and “supermajority of states” that adopt it.<sup>17</sup> Maryland’s delayed adoption of Daubert, the court explained, provides an “added benefit of hindsight” and a broad body of case law to draw upon that will give the state’s courts “a decided advantage when faced with emerging technologies [the court] cannot yet foresee.”<sup>18</sup> These rationales apply equally to any jurisdiction considering whether to improve its rules regarding the admissibility of expert evidence.

Ultimately, adoption of Daubert by states such as Maryland will improve justice for all parties. Requiring judges to act as “gatekeepers” to screen unreliable expert evidence is a neutral rule that promotes fairness across any type of litigation. Although some critics of the Daubert rule have suggested the approach favors only civil defendants, the reality is that the standard protects everyone. For instance, the rule can help plaintiffs dispose of unreliable testimony by a defense expert who rejects a clear causal connection between a harmful exposure and disease before it taints the minds of jurors. The Daubert rule can also aid criminal defendants where a prosecutor puts forth unsound forensic evidence in an attempt to obtain a conviction.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*15.

<sup>15</sup> See *id.* at \*16; see also Federal Rule of Evid. 702.

<sup>16</sup> *Id.* at \*6 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

<sup>17</sup> *Id.* at \*16.

<sup>18</sup> *Id.*

Critics have also argued that Daubert's gatekeeping responsibility is not needed because a party's "[v]igorous cross-examination" alone may be relied upon to adequately screen expert evidence.<sup>19</sup> This argument, however, fails to recognize that cross-examination cannot have its usual corrective value in this situation precisely because the subject matter of expert testimony is not within jurors' knowledge. The Daubert standard exists so that no party suffers prejudice from unsound scientific evidence that a jury may not be equipped to assess on its own.

### 2.3 Potential Action to Improve Implementation of *Daubert* in Federal Rule of Evidence 702

Although the Daubert rule was articulated more than 25 years ago, and subsequently codified in Federal Rule of Evidence 702, concerns have been raised about courts' failing to properly apply the rule.<sup>20</sup> In November 2020, the Federal Rules Standing Committee on Rules of Practice and Procedure will meet to consider whether Federal Rule of Evidence 702 should be amended to clarify the full scope of judges' "gatekeeping" responsibilities.<sup>21</sup> Key issues include whether greater clarification is needed to assure that judges' scrutiny of proposed expert evidence goes beyond the reliability of the scientific methods employed, and includes the reliability of the expert's analysis and opinions flowing from sound methodology, and whether expert evidence is improperly admitted for juries to assess its "weight" where the evidence does not meet Rule 702's threshold admissibility requirements.

In this regard, *Rochkind* provides an excellent resource to parse these important distinctions and to assist other courts. For example, courts such as the U.S. Court of Appeals for Ninth Circuit have boldly declared that a jury can weigh expert evidence that the court acknowledges is on shaky ground.<sup>22</sup> The U.S. Court of Appeals for the Eighth Circuit has said it will *only* exclude a proffered expert's

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<sup>19</sup> *Id.* at \*18 (quoting *Daubert*, 509 U.S. at 596).

<sup>20</sup> See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217 (2006).

<sup>21</sup> See Records of the Rules Committees, U.S. Courts, at <https://www.uscourts.gov/rules-policies/records-rules-committees>.

<sup>22</sup> See, e.g., *Wendell v. GlaxoSmithKline, LCC*, 858 F.3d 1227, 1237–1238 (9th Cir. 2017) (expressing reservations where plaintiff's causation experts did not rely epidemiological studies or other published studies and articles to support their opinions, but concluding "that Daubert poses no bar based on their principles and methodology" where the experts were "two doctors who stand at or near the top of their field and have extensive clinical experience with the rare disease or class of disease at issue.").

opinion where “it is so fundamentally unsupported that it can offer no assistance to the jury.”<sup>23</sup> Such decisions, as *Rochkind* demonstrates, misinterpret the letter and spirit of the Daubert rule and Federal Rule of Evidence 702. The Committee on Rules of Practice and Procedure should endeavor to clarify Federal Rule of Evidence 702 so that the rule is applied by courts in a more consistent, uniform manner.

### 3 Conclusion

Maryland’s high court provided a true public service in the *Rochkind* case, not only for trial judges in the state, but also for trial judges throughout the nation. The court did not simply “adopt” the Daubert rule, as federal courts and most other states have done; it spelled out precisely why the change in law is so important and necessary to a fair justice system. The decision is instructive both for other state jurisdictions seeking to improve expert evidence rules and Federal Rule Advisory Committee efforts to clarify the Daubert rule’s intended application.

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<sup>23</sup> *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 448 (8th Cir. 2008) (quoting *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997)).