



MARYLAND HIGH COURT ADOPTS *DAUBERT* EXPERT EVIDENCE STANDARD

by Victor E. Schwartz

In *Rochkind v. Stevenson*, 2020 WL 5085877 (Md. Aug. 28, 2020), the Maryland Court of Appeals, the state's highest court, replaced its longstanding rule governing the admission of expert scientific evidence with the more rigorous Daubert standard applied in federal courts and most other states. The decision completed what the court described as a "jurisprudential drift" over the past half-century toward greater scrutiny of expert evidence to prevent unreliable science from entering the state's courtrooms. *Id.* at *16.

As co-author of a torts casebook, what struck me about the 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 instructing 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. She sued the landlord of the apartment where she had lived for 15 months 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. *See id.* at *2. At trial, she sought to prove a causal connection through expert testimony. *See id.* at *2-4 (discussing how the case ultimately involved four separate trials). 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.

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. Under evidence rules, laypersons are permitted to give firsthand testimony within their direct knowledge and experience. A jury or other trier of fact can evaluate that testimony based on its 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 car's brakes satisfied certain mechanical standards, expert testimony would be needed because the jury cannot answer that question through its own knowledge and experience.

The question then arises as to how can a layperson jury 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 have "super" 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 do either of these things; 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.

Victor E. Schwartz co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. He is co-author of the best-selling torts casebook in the United States, *Prosser, Wade & Schwartz's Torts: Cases & Materials* (14th ed. 2020).

Daubert Versus Frye. For the past half-century, Maryland had followed a version of the Frye rule in determining the admissibility of expert evidence. This standard centers on whether scientific evidence is “generally accepted” in a relevant scientific community, which is an approach that may produce inconsistent results.

As Maryland’s high court recognized, the Frye rule can be overinclusive in allowing a jury to hear evidence of any “generally accepted” scientific principle or methodology, even if it produces unreliable science. For example, it was “generally accepted” for centuries in the scientific community that the Sun rotated around the Earth until Copernicus debunked that fallacy. At the same time, the Frye rule can be underinclusive in disallowing reliable scientific evidence that has not yet obtained general acceptance in the scientific community. 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.*, 509 U.S. 579 (1993), recognized the shortcomings of the Frye rule and replaced this evidentiary standard. 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. In doing so, the Supreme Court instructed judges to act as “gatekeepers” for the admissibility of reliable scientific evidence.

Pursuant to the Daubert rule, which Maryland now follows, judges must make a threshold determination as to whether a proffered expert’s testimony is based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied the principles and methods to the facts of the case in a manner that will assist the jury or other factfinder. *Rochkind*, 2020 WL 5085877, at *14-16. Judges are to 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. *See id.*; *see also* Federal Rule of Evid. 702; Md. Rule 5-702.

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 decide. Again, this is an important change because layperson jurors may not fully appreciate how novel and unscientific the “expert” testimony actually is.

In adopting *Daubert*, Maryland’s high court also 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. *Id.* at *6 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Further, the court recognized that the more demanding Daubert rule has worked well in the federal courts and “supermajority of states” that adopt it. *Id.* at *16. 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.” *Id.*

The Daubert Standard Promotes Justice for All Parties. Another benefit of requiring judges to act as “gatekeepers” to screen unreliable expert evidence is that the rule works the same for all parties. Although some critics of *Daubert* have suggested the approach favors only civil defendants, and that a defendant’s “[v]igorous cross-examination” alone should be relied upon to adequately screen expert evidence, the reality is that the standard is neutral in application. *Id.* at *18 (quoting *Daubert*, 509 U.S. at 596).

For instance, the rule can help plaintiffs dispose of unreliable testimony by an 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 scientific evidence in an attempt to obtain a conviction. The standard helps ensure that no party suffers prejudice from unsound scientific evidence.

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 civil justice system.