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Strengthening Md.'s expert evidence rule

Maryland's highest court recently adopted a major change in law to prevent unreliable expert evidence -- often called "junk science" -- from entering the state's courtrooms. The court deserves praise for jettisoning an antiquated standard governing the admission of expert scientific evidence, which was prone to abuse, in favor of a more rigorous standard applied in federal courts and most other states.

For the past half-century, Maryland had followed a version of the so-called "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 over inclusive in allowing a jury to hear evidence of any "generally accepted" scientific principle or methodology, even if it produces unreliable science. At the same time, the approach can be under inclusive in disallowing reliable scientific evidence that has not yet obtained general acceptance in the scientific community.

In 1993, the U.S. Supreme Court recognized these shortcomings of the Frye rule and replaced this standard with what is called the "Daubert rule" (named after the case in which the new standard was announced). 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

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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.

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.

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. This is an important change because layperson jurors may not fully appreciate how novel and unscientific the "expert" testimony actually is, which can mislead juries.

A better standard

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.

Further, Maryland's high court recognized that the more demanding Daubert rule has worked well in the federal courts and "supermajority of states" that adopt it. 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."

The court's wisdom in adopting Daubert, and enlisting Maryland's trial judges to serve as gatekeepers against unreliable expert evidence, will likely go unnoticed by most of the state's residents, but it is a decision that will significantly improve fairness in Maryland's civil justice system.

The court should be applauded for this decision, and the decision should serve as a guide for other state high courts looking to remove junk science from courtrooms.

Victor Schwartz is a former law professor and law school dean and current co-chair of the public policy group of the law firm Shook, Hardy & Bacon, L.L.P.

How to fight coronavirus vaccine phobia

The world is soon likely to confront a serious new challenge to the fight against COVID-19: vaccine hesitancy.

In the U.S. and U.K., large numbers of people -- at least 30 percent -- have said in recent surveys that they would hesitate to take or refuse a vaccine that could protect them from the coronavirus and slow its spread.

What can be done? To answer that question, we need to understand why some people are reluctant to take vaccines. Research explores the influence of three factors, often known as the three Cs.

The first is convenience. Human beings suffer from inertia, and they also procrastinate. If it's not so easy to get vaccinated, many people won't do it.

Physical proximity to vaccination sites helps; so do short waiting times. Long lines hurt. So do paperwork requirements and administrative obstacles. If widespread immunity is the goal, officials must not underestimate the importance of eliminating inconveniences, both small and large.

The good news is that when vaccines are easily available, the rate of vaccination increases greatly, even among people who have doubts.

The second factor is complacency. With respect to diseases, a lot of people tend to think that their personal risk is low. "Optimism bias," as it is called, makes vaccination seem unnecessary.

The third factor is confidence: public trust in the efficacy and safety of the vaccine, and also in the motivations and competence of those who are behind it. Many people distrust vaccines in general. Many others distrust particular vaccines, or new ones, which they might perceive to be inadequately tested. In extreme form, distrust turns people into anti-vax activists.

In the context of COVID-19, distrust



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might well be a particular problem, potentially leading many people to think, "I am not going to be a human guinea pig," or at least to wait for some period before getting vaccinated. During that waiting period, a lot of people might get sick.

Addressing concerns

For those seeking to promote vaccination, the first step is to specify the particular source of hesitancy, and to learn which is most important, and exactly where.

For poor people, a lack of convenience might loom large. Among young people, the main problem might be complacency. For people who distrust authority and science, and who think that experts have no idea what they are doing, the problem is a lack of confidence.

Convenience might turn out to be the easiest problem to solve. Once a safe and effective vaccine is available, it should be a high priority to ensure that it is easy for everyone to get (starting with people who are at particular risk). An economic incentive, such as a small gift certificate, can help.

Complacency is likely to be a special problem for those who believe, reasonably or not, that their personal mortality risk is low. A good response would be to offer vivid warnings, including truthful narratives about deaths and serious illness among those who are young, healthy and tough.

It can also help to emphasize that

vaccination protects not only those who get vaccinated, but also others whom they might otherwise infect. If young people think that their own risks are low, they might nonetheless choose to get vaccinated if they are convinced that doing so will protect somebody's mother or grandmother.

Confidence can be the toughest nut to crack. Misinformation strengthens public distrust, and with respect to a COVID-19 vaccine, there is bound to be a lot of that.

The good news is that it's possible to debunk misinformation, above all by emphasizing facts, and not drawing a lot of attention to falsehoods (mentioning them, even in the course of a debunking effort, can backfire).

For people who distrust the authorities, an effective response is to meet them where they are, and to appeal directly to their sense of social identity or culture. Such responses, sometimes described as "community-based," inform people that their peers, and those with their own values, are getting vaccinated.

Credible or surprising "validators" -- high-profile people who are respected and admired by those who lack confidence in vaccines -- could be a big help.

It's obvious that scientific questions have scientific answers. It's less obvious that questions about human behavior also have scientific answers. With respect to how to promote vaccination, our intuitions often go badly wrong.

But there's a lot of evidence out there, and in trying to protect people from COVID-19, nations can draw on it. The challenge, and the opportunity, is that everyone will be in uncharted waters, which means that we have to be flexible and willing to learn what works and what doesn't.

Cass R. Sunstein is a Bloomberg Opinion columnist.