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Maryland Adopts Federal *Daubert* Standard for Admissibility of Expert Testimony

The Court of Appeals Opinion Closes Procedural Gaps and Aligns Legal Standards with Scientific Analysis

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The Court of Appeals of Maryland adopted the *Daubert* standard, overturning Maryland's long held *Frye-Reed* precedent for determining the admissibility of expert opinion. *Rochkind v. Stevenson*, No. 47, September Term 2019 (Aug. 28, 2020); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While the change may seem sudden, the decision should be welcomed as the end to the three decades of confusion about how to simultaneously apply both *Frye-Reed* and Maryland Rule 5-702 (which imputes a *Daubert*-like analysis).

The New Expert Testimony Standard in Maryland

Maryland trial judges will now be expected to evaluate expert opinion pre-trial, and out of the hearing of the jury. The pre-trial hearing, moreover, should not be limited to the question of whether the scientific opinion is generally accepted as reliable in the relevant field of expertise (*Frye-Reed*), but considered among the ten *Daubert* factors that provide a framework for determining "whether a sufficient factual basis exists to support the expert testimony" Md. Rule 5-702 (3):

1. Whether the theory or technique can be (and has been) tested;
2. Whether a theory or technique has been subjected to peer review and publication;
3. Whether a particular scientific technique has a known or potential rate of error;
4. The existence and maintenance of standards and controls;
5. Whether a theory or technique is generally accepted;
6. Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying;
7. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
8. Whether the expert has adequately accounted for obvious alternative explanations;
9. Whether the expert is being careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting;
10. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

The Complications of Novel and Scientific Testimony Under Frye-Reed

Under *Frye-Reed*, Maryland courts undertook a complicated analysis to apply both *Frye-Reed* and Maryland Rule 5-702 to assess expert opinions concerning topics deemed "novel" and "scientific." Where an expert opinion was novel and scientific, Maryland courts were required to conduct a pre-trial hearing to determine whether the opinion was generally accepted as reliable by experts in the relevant field.^[1] After the federal courts moved to *Daubert* in 1993, the Maryland Rules committee adopted the three-part analysis set forth in Maryland Rule 5-702. The third factor addressed assessing the basis for the expert testimony, yet a footnote to the rule made it clear that the *Frye-Reed* analysis also applied.^[2]

This two-standard structure created confusion and gaps that litigants and hired-gun experts learned to exploit. Proponents of unreliable expert testimony knew they could get the testimony in front of jurors if it was clothed in the garb of the accepted or the non-scientific, and therefore never implicate the pre-trial *Frye-Reed* hearing.^[3]

Incongruous Results Under Frye-Reed Standard

These exploitable gaps, and the inconsistent outcomes they caused, were particularly apparent in the toxic-tort context. In both *Rochkind* and *Blackwell*, the experts claimed to use generally accepted epidemiological methods and data to establish a link between the toxin and a condition: lead and attention deficit disorder in *Rochkind* and exposure to Thimerosal in childhood vaccines and autism in *Blackwell*.^[4] While seemingly similar, the manner in which the testimony played out (and was admitted) was markedly different. In *Rochkind I*, the trial judge allowed the jury to hear testimony despite the experts inability to “close the analytical gap” between the epidemiological data and his conclusion that lead exposure caused plaintiff’s attention deficit disorder.^[5] That jury awarded plaintiff \$1,103,000. In contrast, the *Blackwell* Court excluded the expert’s testimony during the *Frye-Reed* hearing and awarded defendant summary judgment. The days of such inconsistency are over.

The New Expert Testimony Standard in Maryland

By adopting *Daubert* as a component of Maryland Rule 5-702, the Court of Appeals corrected procedural irregularities and will force the proponents to demonstrate the reliability of their expert’s testimony before trial and out of the hearing of the jury. By adopting *Daubert*, the Court of Appeals of Maryland has provided trial judges with a framework and a robust body of existing case law to assist in assessing an expert’s opinion.^[6] Although *Rochkind*’s dissent correctly points out that *Daubert* is far from perfect, the *Frye-Reed*-Maryland Rule 5-702 interplay was procedurally broken, easily exploited by proponents of “junk-science,” and due to be repealed.

An examination of an expert’s credentials and testimony based on *Daubert* demands higher quality expert opinion before a jury is ever sworn and will shield juries from testimony designed to mislead jurors away from proven facts and science, which leads to inconsistent and unpredictable verdicts. The official shift to *Daubert* has been one in the making for a long time and should not prove too daunting for either the bench or bar.

Under the new Maryland precedent, it is critical to have experts that meet the *Daubert* standard and attorneys who are fluent in the federal expert procedure. Saul Ewing Arnstein & Lehr LLP attorneys have extensive experience hiring, preparing, and qualifying experts under the *Daubert* standard and can offer advice and counsel for matters requiring expert testimony. If you have questions about this Alert, please contact the author.

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1. See *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314 (2007) (“*Chesson I*”) (requiring such pre-trial hearings)
 2. See Comm. Note to Md. Rule 5-702 (“The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law.”)
 3. A second procedural gap was in standard of review. *Frye-Reed* decisions were to be reviewed de novo while Maryland Rule 5-702 and *Daubert* decisions are reviewed for abuse of discretion.
 4. See *Rochkind v. Stevenson*, No. 47, September Term 2019 (Aug. 28, 2020); see also *Blackwell v. Wyeth*, 408 Md. 575 (2009).
 5. See *Rochkind v. Stevenson*, 454 Md. 277, 295-96 (2017) (“*Rochkind I*”).
 6. To date, 40 states and the federal bench all employ *Daubert* in one form or another. See *Rochkind v. Stevenson*, No. 47, September Term 2019, at 13 n. 7 (Aug. 28, 2020)

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