

# Maryland Adopts Daubert Standard for Expert Testimony: Fallout from Jurisprudential Drift

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On August 28, 2020, the Court of Appeals of Maryland adopted the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (*Daubert*) standard for admitting expert testimony. [See Stanley Rochkind v. Starlena Stevenson](#), No. 47, September Term 2019 (Md. Ct. App. August 28, 2020). In the four-three majority opinion written by Judge Joseph M. Getty, the Court of Appeals held that Maryland will now “implement a single standard by which courts evaluate all expert testimony: *Daubert*.”

Maryland previously applied a *Frye-Reed* standard for admitting expert testimony, which required the expert opinion to be generally accepted as reliable in the scientific community. The court acknowledged that the *Frye-Reed* standard often was confusing in application, muddled by duplicative analyses under Maryland Rule 5-702, and drifting toward several *Daubert* factors. In joining the “supermajority” of states adopting *Daubert*, Maryland courts will now analyze the reliability of the principles and methods of an expert opinion by considering various factors before admitting the expert testimony.

## New Standard for Admissible Expert Testimony in Maryland

As a result of this recent decision, Maryland trial courts will apply one standard to the admissibility of all expert testimony.

A court may admit an expert opinion after considering the following five factors. Whether:

- A theory or technique can be and has been tested
- A theory or technique has been subject to peer review and publication
- A particular scientific technique has a known or potential rate of error
- Standards and controls are maintained

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- A theory or technique is generally accepted.

The trial court also will have discretion to consider the following five additional factors before admitting the expert opinion. Whether:

- The expert is proposing to testify about matters growing naturally and directly out of research he or she has conducted independent of the litigation, or whether he or she has developed opinions expressly for purposes of testifying
- The expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion
- The expert has adequately accounted for obvious alternative explanations
- The expert is being as careful as he or she would be in his or her regular professional work outside of paid litigation consulting
- The field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

The Court of Appeals of Maryland confirmed that a trial court has discretion to consider all or none of these factors depending on the specific circumstances of the expert testimony and case. However, the analysis for admitting expert testimony under *Daubert* requires a trial court to focus on the methodology employed by the expert and whether the conclusion is too distinct from that methodology.

## **The Drifted and Confused *Frye-Reed* Standard**

In this recent opinion, the Court of Appeals acknowledged that Maryland often has confused and “muddied” the waters for the application of Maryland Rule 5-702 and the *Frye-Reed* standard for novel scientific principles or methods. Maryland trial courts previously had to analyze admissibility of expert testimony twice: once under *Frye-Reed* to determine general acceptance and once under Maryland Rule 5-702 for reliability.

The *Rochkind v. Stevenson* (also called *Stevenson II*) opinion noted that Maryland has been drifting toward *Daubert* over the past several decades. The court noted that in *Reed v. State*, 283 Md. 374 (1978), Maryland adopted the *Frye* standard for admitting expert testimony when it is based on “new scientific techniques.” However, Maryland thereafter applied this *Frye-Reed* test inconsistently toward both new and old scientific principles, as well as scientific conclusions. The court also reasoned that Maryland has adopted the “analytical gap” analysis, which is an extension of *Daubert* Supreme Court jurisprudence.

This blended and duplicative standard for admissibility of expert testimony has been criticized as confusing. Indeed, many other jurisdictions have reasoned that the *Frye* standard alone is restrictive and conceptually flawed in that it inappropriately excludes reliable opinions that are not yet generally accepted.

In adopting *Daubert*, the *Stevenson II* court reasoned that Maryland has been drifting toward

the *Daubert* factors and that application of a single, uniform test for the admissibility of expert testimony would provide trial courts with clearer guidance and instruction.

## Implications for Maryland Expert Preparation and Procedure

After Judge Getty's majority opinion, Maryland expert testimony will be held to a standard centered on reliability of the method and the connection between the method and the conclusion. Maryland experts and attorneys should be aware of and review all 10 factors highlighted above before submitting expert testimony and reports.

Although the Court of Appeals replaced the *Frye-Reed* standard, it nevertheless held that the trial court erred in failing to hold a pre-trial hearing on the admissibility of an expert opinion. Therefore, Maryland attorneys should be prepared for a Maryland Rule 5-702 hearing for a trial court to consider the *Daubert* factors when there are challenges to an expert's methodology or any alleged analytical gap.

In addition, the *Stevenson II* opinion provides the framework for Maryland counsel to challenge the admissibility of expert testimony. The Court of Appeals highlighted that by joining the "supermajority of states [*sic*] and federal courts to adopt the *Daubert* standard," they are able to do so with the "benefit of hindsight." Trial courts will be able to consider the case law analyzing the admissibility of expert testimony under *Daubert* from other jurisdictions and federal courts. Specifically, the court emphasized that guidance in the *Daubert* Trilogy of Supreme Court cases – *Daubert*, *Joiner* and *Kumho Tire*, codified in Federal Rule of Evidence 702 – will be critical to a trial court's reliability analysis.

Adopting *Daubert* will result in a "more straightforward analysis of expert testimony," especially as advances in science and technology continue to emerge at an unprecedented rate. Now that the Court of Appeals has completed the final "jurisprudential drift," judges, attorneys and expert witnesses alike must shift to the *Daubert* approach.

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