Experts – Frye-Reed v. Daubert

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Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

- "…the thing from which the deduction is made must be sufficiently established to have gained **general acceptance** in the particular field in which it belongs." *Frye* at 1014.
- Not cited by any Court for next 10 years, and in 25 years after issuance, only cited by 8 federal opinions and 5 state cases.
- Adopted in Maryland in *Reed v. State*, 283 Md. 374 (1978).
- "General acceptance" means that the answer cannot vary from case to case. *Wilson v. State,* 370 Md. 191 (2002).

PROGRESSION OF *FRYE-REED*

- *Blackwell v. Wyeth*, 408 Md. 572 (2009), Court applied *Frye-Reed* not only to methodology used by the expert, but also to the opinion itself. Even when underlying data is "generally accepted," if "analytical gap" exists between data and the opinion, *Frye-Reed* requires exclusion of opinions.
- While unanimity is not required to establish general acceptance, if there is a genuine controversy within the scientific community over a scientific process, methodology or link, there cannot be consensus among the relevant scientific community. *Montgomery Mutual v. Chesson*, 206 Md. App. 569 (2012), *aff'd* 434 Md. 346 (2013).
- *Chesson v. Montgomery Mutual*, 434 Md. 346 (2013) - *Frye-Reed* ensures rendition of judgment on the merits, not the drama of expert testimony that inures to courtroom presentations.

Rochkind v. Stevenson, 454 Md. 277 (2017)

- Issue of whether scientific community supported expert opinion that exposure to lead causes ADHD.
- Court found that expert did not provide sufficient factual foundation under Md. Rule 5-702, because epidemiological studies did not support conclusion of causal relationship between lead and ADHD, only lead and general attention deficits, and expert did not differentiate her opinion between general attention deficits and clinical ADHD diagnosis.
- Epidemiological studies only reveal an *association*, not a causal connection, resulting in expert overstating the known effects of lead exposure. Court concluded there was an "analytical gap" between the studies and data and expert's opinion.
- Declined to address *Frye-Reed*, because the opinions did not survive under Md. Rule 5-702.

Levitas v. Christian, 454 Md. 277 (2017)

- Decided same day as *Stevenson*. Opinion authored by same judge (Judge Adkins) as *Stevenson*.
- Issue was admissibility of Plaintiff's medical expert's testimony regarding both the source of Plaintiff's exposure to lead and Plaintiff's injuries caused by exposure to lead.
- Strange procedural history
- Court of Appeals ruled that under the "substantial factor test," medical doctor did not have to exclude other possible sources of lead exposure when there is direct evidence of lead in the subject defendant's property
- Trial court ruled that there "was no sustainable reason" to conclude medical expert was not qualified to testify as to injuries caused by lead exposure.

Savage v. State, -- Md. --, 166 A.3d 183 (2017)

- Court focused not on whether the expert's approach was "generally accepted" in scientific community, but whether expert's opinions bridged "analytical gap" between the data and information available and expert's ultimate opinion.
- Court found expert's opinions conclusory, holding expert failed to articulate a connection between the performance data from the testing, failed to explain how the defendant's performance during the testing lead to the ultimate opinion reached, and failed to explain how ultimate conclusions were derived from the evidence.
- The "details" underpinning expert's opinions are "exactly pertinent" to *Frye-Reed* gatekeeping role, as an expert must "connect the dots" at the *Frye-Reed* hearing, not before jury.
- Contradictory expert testimony not required at *Frye-Reed* hearing to render opinions inadmissible.

Federal Rule 702 – Testimony by Experts

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Maryland Rule 5-702

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

- Held that *Frye's* "general acceptance" test was an "austere standard, absent from, and incompatible with, the Federal Rules of Evidence."
- Liberalized Rule 702 provides "gatekeeping" role to directly assess and ensure reliability and relevance of proffered opinion.
- Reliability factor focuses on an opinion's methodology and not its conclusion, and requires that expert's testimony pertain to "scientific knowledge."
- Approach is "flexible one", but emphasized that focus must be on principles and methodology, not on the conclusions they generate.
- Intended to prevent introduction of "junk science"
- Criticized *Frye* as being issued "citation free"

Daubert Test

- Evidence must be ***reliable*** and ***relevant***
- Court provided four ***non-exclusive*** factors for District Court to assess in determining whether reasoning or methodology is scientifically valid:
    - Whether theory, methodology or technique can be, and has been tested
    - Whether it has been subjected to peer review and publication
    - The known or potential rate of error
    - Has it been generally accepted

Daubert Trilogy

- In *General Electric v. Joiner*, 522 U.S. 136 (1997) the Court rejected notion that under *Daubert*, a Court could only evaluate the methodology of the studies, and not the expert's conclusion.
- Held that the proper standard of review for a trial court's ruling as to expert testimony is "abuse of discretion."
- Big take away was the "analytical gap" discussion. "Trained experts commonly extrapolate from existing data. But nothing in [] *Daubert* . . . Requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." Instead, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

Daubert Trilogy

- In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court articulated that the court's gatekeeping function applies to all expert testimony, not just "scientific" testimony, noting that Federal Rule of Evidence 702 applies not only to "scientific" testimony, but also "technical," and "other specialized" testimony.
- As important, the court stressed that *Daubert* is not one-size-fits-all, and that the so called *Daubert* factors are for guidance, but are not some kind of check list.
- Reliability and relevance evaluation ensures that expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

Point-CounterPoint of *Daubert* Criticisms

- Most criticism of *Daubert* comes from the plaintiffs' bar, as more plaintiff-proffered expert testimony than defendant-proffered expert testimony is rejected by courts.
  - This may be, however, because the nature of plaintiff's cases tend to push the bar on the types of expert testimony proffered.
- Gives trial judges the opportunity to prevent a case from going to a jury, and may have the appearance of using *Daubert* to reduce case loads.
  - Whole point of the "gatekeeping" role is to prevent issues going to the jury when expert opinions inadmissible.
- Trial judges ill-equipped to be scientific gatekeepers, and may exclude evidence that is peer reviewed and generally accepted due either to lack of ability to understand it or bias.
  - It is the role of attorneys and experts to educate trial judges to enable understanding of these complex issues.

Point-CounterPoint of *Daubert* Criticisms

- *Daubert* places a substantial burden on trial courts, requiring immense expenditures of time and scarce judicial resources to conduct "mini-trials" over disputes over scientific, medical and other complex opinions.
  - However, a few days of a *Daubert* hearing may result in the avoidance of weeks of trial in certain circumstances.
- Process results in subjective decisions based upon the flexible factors, and may result in lack of consistency over the admissibility of identical expert testimony, applying identical methodology, all dependent upon the trial judge hearing the issue.
  - There is a wealth of reported opinions from federal court and 38 States that apply *Daubert*, providing guidance on a vast majority of expert opinions and methodology.

Concurring Opinion in *Savage v. State*

- Judge Adkins, joined by Judges Barbera and McDonald, filed a concurring opinion calling for the explicit adoption of *Daubert* by Maryland Courts.
- Judge Adkins notes the confusion that Maryland Courts have created regarding the *Frye-Reed* standard.
- Judge Adkins provides an excellent discussion of the evolution of *Frye-Reed* in Maryland jurisprudence, and the evolution of *Daubert,* noting that Maryland's *Frye-Reed* approach has gradually moved towards the *Daubert* approach.
  - First, the Court has applied *Frye-Reed* to testimony based on any scientific principle - new or old, implicitly recognizing that a trial judge's gatekeeping role should not be limited to new scientific theories – old "junk science" should be kept out as well.

Concurring Opinion in *Savage v. State*

- Second, the Court has modified the reach of *Frye-Reed* to not only evaluate scientific methods, but also to assess scientific conclusions, citing *Wilson v. State*, where the Court sought to determine whether the expert's intermediary conclusion – which then led him to use the well-established "product rule" for calculating probabilities among independent events – was generally accepted.
- In *Blackwell*, Court conducted a *Frye-Reed* analysis, but drew extensively from case law stemming from *Daubert*, and adopted the *Joiner* discussion of "analytical gap," broadening the reach of *Frye-Reed* beyond methodology to the reach the opinion itself.

• Adopting *Daubert* would avoid the dual analysis required under Maryland law – first under *Frye-Reed* and then under Maryland Rule 5-702(3)

Concurring Opinion in *Savage v. State*

- Judge Adkins persuaded by recent D.C. Court of Appeals decision, noting that the "ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and judges alike."
  - While *Daubert's* flexible standard will inevitably produce some inconsistencies, it will more accurately distinguish "good science" from "bad science" than *Frye's* general acceptance test.
- Adopting *Daubert* will also allow Maryland Courts to draw from and contribute to broad base of case law grappling with scientific testimony.