Virginia’s answer to Daubert’s question behind the question

Who determines if the science is reliable?
Virginia assumes the jury can usually be trusted to separate the sheep from the goats.

by D. ARTHUR KELSEY

My interest in Daubert lies beneath the shifting tectonic plates of academic debate regarding its specific application to differing schools of scientific knowledge. To me, the more important (and considerably more worrisome) question is not whether this or that type of novel scientific opinion is reliable—but rather who gets to decide whether it is or not.

The Daubert Effect

For 70 years, pre-Daubert federal courts allowed scientific opinion testimony when the underlying scientific theory or basis of opinion was generally accepted as reliable within the expert’s particular field.1 Daubert held that Federal Rule of Evidence 702 superseded the Frye standard, replacing it with a flexible test focusing on reliability. Daubert described the Frye standard as out of sync with the “liberal thrust” of the Federal Rules of Evidence and incompatible with their goal of “relaxing the traditional barriers to ‘opinion’ testimony.”2 Frye’s “austere standard,” Daubert concluded, could not be reconciled with the “permissive backdrop” of the expert opinion rule.3

As the Fourth Circuit quite reasonably put it a few years later, scientific opinion evidence under Daubert should be admitted “more liberally under Rule 702 than it was under Frye.”4

Problem is, 10 years later, hardly anyone now believes that. Professor Cheng states the consensus view this way:

Although the practical effects of Daubert were initially ambiguous, the enduring legacy of the Daubert decision is now relatively clear . . . . Daubert has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely . . . . The resulting effects of Daubert have been decidedly pro-defendant. In the civil context, Daubert has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries.5

Anecdotal evidence from federal trial judges confirms this view. As the Federal Judicial Center reports:

Compared to 1991, judges in 1998 reported that they were more likely to scrutinize expert testimony before trial and were less likely to admit it. Judges said that they limited or excluded some of the testimony proffered by experts in 41% of the referenced 1998 cases, compared to only 25% of the referenced 1991 cases.

These figures support the suggestion that judges may exercise more control over expert evidence post-Daubert than was done in pre-Daubert times.6

The views advanced in this essay represent commentary “concerning the law, the legal system, [and] the administration of justice” as authorized by Virginia Canon of Judicial Conduct 4(B). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

3. Id. at 589.
Despite all its rhetoric about liberal- 
ity, truth be told, Daubert has under- 
gone a rather illiberal evolution. As 
revealed by a telling slip of the tongue 
by Justice Ruth Bader Ginsburg, 
Daubert is now understood to impose 
“exacting standards of reliability,” far 
less flexible and permissive than any-
one anticipated.

The gate-closing instincts of gate- 
keepers in response to the new 
open-gate policy (which, for lack of 
a better expression, I call the 
“Daubert Effect”) cannot be easily 
explained. Perhaps it occurred 
because of the repeated statements 
in later opinions about the trial 
court’s “special obligation” under 
Daubert to keep out inadmissible 
expert testimony. From this, trial 
judges probably reason that 
Daubert requires a higher level of rigor than 
the evidently not-so-special duty to 
exclude other inadmissible testi-
mony (hearsay, irrelevancies, and 
the like) trying to sneak past the 
gatekeeper during a typical trial.

It may well be, too, that this evolu-
tion came about as a result of 
concurrent opinions targeting “junky” 
science, or gratuitously suggesting 
that trial judges appoint “special 
masters” or “specially trained law 
clers” to assist in the gatekeeping 
function. Such additional man-
power, one would think, would be 
needed more to secure the gate in 
a closed rather than an open position.

I also wonder if the Daubert 
dichotomy between science and 
law contributed to the Daubert 
Effect. Daubert described science as an “exhaustive search for cosmic 
understanding” and law as a mere “particu-
larized resolution of legal disputes” 
that, sometimes, must take place 
without the benefit of “authentic 
insights and innovations.” No 
doubt this obsequious insight left 
more than a few gatekeepers suppos-
ing that too much expert testimony 
about the cosmos must have found 
its way into the courtroom.

Finally, I cannot overlook the cyni-
cism of many trial lawyers, who sug-
gest that trial judges may have 
responded to their new tasking orders 
der Daubert (particularly the neces-
sity of conducting a pretrial trial in 
every case involving experts) by con-
cluding that, more often than before, 
hearing the opinion once is enough.

The question behind the question

I do not know if any of these 
hypotheses explain how the Daubert 
Effect could have evolved from 
Daubert. Instead, I raise them mostly 
to preface my main point. As I have 
argued elsewhere,

before any serious legal question can be 
answered, another a priori question must first be asked: Who decides? That 
is, we cannot say what the answer is 
until we know who gets to make the 
call. This who-decides question neces-
sarily stems from the comprehensive 
devolution of power inherent in the 
American system of government. It is 
the question that precedes every other. 
And it is the one question that, if over-
looked, will put in doubt all answers to 
all other questions.

Applied to Daubert, this thesis shifts 
the debate from whether this or that 
bit of expert opinion is reliable to the 
more important question of who gets 
to decide whether it is or not.

Frye unwittingly delegated the 
judgment call primarily to the scientific 
community by admitting into evidence only theories and tech-
iques generally accepted by main-
stream institutions of science. The 
unstated maxim appeared to be, “let the experts judge the experts.” In 
other words, if real experts outside 
the courtroom regularly treated the 
proffered theories and techniques as 
legitimate, then would be experts 
inside the courtroom could do so as 
well. The problem with this 
approach, though, is that main-
stream science becomes mainstream 
through a cautious, slow-moving 
process. It gains strength from an 
institutional inertia that sometimes 
begrudgingly acknowledges novel, 
but legitimate, scientific discoveries 
while dogmatically defending older, 
but discredited, scientific orthodoxy.

Daubert, on the other hand, dele-
gates the judgment call mostly to 
individual trial judges by authorizing 
them to act as “amateur scientists”

and then by protecting their deci-
sions from risk of reversal with the 
highly deferential abuse-of-discres-
tion standard of appellate review.

A trial judge under Daubert does not 
ask if a reasonable juror could find 
the proffered scientific opinion reli-
able. The judge asks whether he 
personally finds it reliable or unreliable.

If the opinion does not pass his 
application of Daubert’s “exacting 
standards,” the jury never hears it.

Exactly the point, Daubert’s advo-
cates reply. Only by doing so can we 
be confident that scientific sophistry 
will not fuel credulous decision mak-
ing by juries. Though critics scoff at 
judges “donning white coats and mak-
ing determinations that are outside 
their field of expertise,” Daubert con-
cedes this weakness, but nonetheless 
finds it “less objectionable than 
dumping a barrage of questionable 
scientific evidence on a jury, who 
would likely be even less equipped 
thanhate judge to make reliability and 
relevance determinations and more 
likely than the judge to be awestruck 
by the expert’s mystique.”

This reasoning troubles me at sev-
eral levels. Beginning with its elitist 
tone, this explanation for the Daubert 
Effect betrays a condescending view of 
juries, one unifying our proud tradi-
http://www.ajs.org JUDICATURE 69
jury as an ad hoc exercise in popular sovereignty. To many of the Framers’ generation, the jury was “the lower judicial bench in a bicameral judiciary” and the “democratic branch of the judiciary power—more necessary than representatives in the legislature.” To them, the jury was “no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”

“Through juries, the consent of the governed would flow continuously, not just in election-day spurts.”

Because the jury served as a core aspect of popular sovereignty, the architects of the Constitution strictly policed the definitional lines between questions of law and fact—the analytical lever distributing decision-making power over a topic either to the judge or to the jury. To be sure, after the Philadelphia Convention issued the original draft of the Constitution, many during the ratification debates were shocked to learn that Article III invested the U.S. Supreme Court with appellate power over questions of “law and fact.” This concern contributed to their demand for the Seventeenth Amendment, which made clear that “no fact tried by a jury shall be disagreed to in either House, unless a majority of each of the Houses shall agree to the contrary.”

The Framers understood that every decision characterized as a question of law for the court, rather than a question of fact for the jury, transferred power from the people’s ad hoc representatives (serving as temporary guardians of the popular will) to unelected, life-tenured judges (serving as permanent guardians of the judicial will).

The Daubert effect reformatte the reliability standard into a question of law, thereby giving the judge a preemptory veto over any contrary conclusion. The jury was reduced to a question of “law and fact.”24 This concern contributed to the demand for the Seventeenth Amendment, which made clear that “no fact tried by a jury shall be disagreed to in either House, unless a majority of each of the Houses shall agree to the contrary.”

25. Indeed, just a decade before deciding Daubert, the U.S. Supreme Court was “unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence . . . .” Barefoot v. Estelle, 463 U.S. 880, 901 (1983). The Court rejected the alternative argument, finding “no room for the argument that any adversary system is too burdened with the unreliable evidence to be worth retaining.” Id. at 900, note 7.

26. In 1993, the Virginia legislature enacted Va. Code § 8.01-401.3(A). It tracked verbatim the then-existing Federal Rule of Evidence 702, the

The Virginia Answer

Since its earliest years, Virginia has jealously guarded the institution of the jury. It was, after all, one of our favored sons that said with characteristic hyperbole: “Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.” We thus had little trouble rejecting Frye as an exclusive standard because it gave too much weight to the general consensus of the scientific community and too little weight to the specific consensus of the jury.

In 1993, the Virginia legislature enacted Va. Code § 8.01-401.3(A). It tracked verbatim the then-existing Federal Rule of Evidence 702, the


23. Id. at 409.

24. Kelsey supra note 12, at 15 (citing U.S. CONST. art. III, § 2.).

25. Id. at 14-15.


same version interpreted by Daubert. Since then, the Virginia General Assembly has rejected invitations to rewrite that statute to reflect the 2000 amendments to Rule 702, changes intended to better conform the Rule to the specific language of Daubert. The Virginia Supreme Court likewise has taken note of Daubert, but has conspicuously declined to adopt it\(^\text{29}\)— probably for fear that doing so would import into Virginia law the unhelpful mass of federal caselaw giving birth to the Daubert Effect.

Using traditional formulations, Virginia law requires that expert testimony meet “certain fundamental requirements.”\(^\text{30}\) It cannot be founded on "speculative" assumptions or rely on an "insufficient factual basis."\(^\text{31}\) Nor can a proffered opinion contain "disregarded" variables,\(^\text{32}\) rely on “dissimilar tests,”\(^\text{33}\) or create an “illusory impression of exactness.”\(^\text{34}\) In screening expert opinions, however, Virginia judges do not themselves deem the opinion reliable (and thus admissible) or unreliable (and thus inadmissible). Rather, they make only a "threshold finding,”\(^\text{35}\) focusing on whether a reasonable juror could find the expert opinion reliable and decide the case in reliance upon it.

Stated differently, the judge asks if the “evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine the credibility for itself.”\(^\text{36}\) Under this standard, where the issue of scientific reliability is disputed, if the court determines that there is a sufficient foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight.\(^\text{37}\)

In the end, the final decision on “disputed reliability”\(^\text{38}\) belongs solely to the jury.

Some commentators dismiss our approach as “laissez faire”\(^\text{39}\) which (as the etymology of that French phrase ironically denotes) means “to let the people do as they choose.” I see in that very dismissal an apologetic we can confidently endorse. The Virginia approach implicitly answers the question behind the question. The true issue is not whether this or that novel science is reliable, but rather who gets to make the call. Virginia’s open-gate policy assumes the jury can usually be trusted to separate the sheep from the goats. Our so-inherently-unreliable principle shuts the gate only on those expert opinions which, if actually relied upon by juries, would violate our trust in their presumptive rationality and thereby justify the revocation of their fact-finding authority. Preserving the traditional balance of power between judge and jury, Virginia honors both and devalues neither.\(^\text{40}\)

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\(\text{29. John v. Im, 263 Va. 315, 322, 559 S.E.2d 694, 697-98 (2002).}\)
\(\text{30. Tittsworth v. Robinson, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996).}\)
\(\text{31. Forbes v. Rapp, 269 Va. 374, 381, 611 S.E.2d 592, 596 (2005).}\)
\(\text{32. Tittsworth, 252 Va. at 155, 475 S.E.2d at 263.}\)
\(\text{33. Id.}\)
\(\text{34. ITT Hartford Group, Inc. v. Va. Fin. Assoc., Inc., 258 Va. 193, 201, 520 S.E.2d 355, 360 (1999).}\)
\(\text{35. Im, 263 Va. at 322 n.3, 559 S.E.2d at 698 n.3 (citing Satcher v. Commonwealth, 244 Va. 220, 244, 421 S.E.2d 821, 835 (1992), and Spencer v. Commonwealth, 240 Va. 78, 97-98, 393 S.E.2d 609, 621 (1990)).}\)
\(\text{36. Satcher, 244 Va. at 244, 421 S.E.2d at 835 (emphasis added) (quoting Spencer, 240 Va. at 98, 393 S.E.2d at 621).}\)
\(\text{37. Spencer, 240 Va. at 97-98, 393 S.E.2d at 621 (citation omitted).}\)
\(\text{38. Id.; see Hetmeyer v. Commonwealth, 19 Va. App. 103, 108-09, 448 S.E.2d 894, 898 (1994) (“A challenge to an ‘expert’s… methods and determinations…, even by other experts, does not render inadmissible expert opinion based on those… methods and computations’ but goes to the ‘weight of the evidence,’ raising ‘factual questions to be determined by the jury.’” (citations omitted)).}\)