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Schultz v. Bank of America: a Fly in the Financial Buttermilk - Clarifying the Common Knowledge Exception to Improve Litigation Efficiency and Bank Safety

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Note

SCHULTZ v. BANK OF AMERICA: A FLY IN THE FINANCIAL BUTTERMILK—CLARIFYING THE COMMON KNOWLEDGE EXCEPTION TO IMPROVE LITIGATION EFFICIENCY AND BANK SAFETY

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In *Schultz v. Bank of America, N.A.*,[1] the Court of Appeals of Maryland considered whether expert testimony was required to determine the standard of care owed by a bank when adding a customer to an account.[2] The court held that expert testimony was necessary to establish the applicable standard of care[3] because adding a customer's name to an account involves internal bank procedures of which a trier of fact has only minimal understanding.[4] In so holding, the court mischaracterized the procedure as complex and opaque[5] and failed to appropriately define the common knowledge exception,[6] thereby improperly placing the burden of loss on plaintiffs[7] rather than on defendant banks capable of investing in innovative security technology.[8] The *Schultz* court should have instead adopted a clear test for the common knowledge exception that would not

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1. 413 Md. 15, 990 A.2d 1078 (2010).
2. *Id.* at 27, 990 A.2d at 1085.
3. *Id.*
4. *Id.*, 990 A.2d at 1085–86.
5. *See infra* Part IV.A.
6. *See infra* Part IV.B. The common knowledge exception generally holds that expert testimony is only required where the inference at issue "'is so particularly related to some science or profession that it is beyond the ken of the average layman.'" Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd., 109 Md. App. 217, 257, 674 A.2d 106, 125 (1996) (quoting Virgil v. "Kash N' Karry" Serv. Corp., 61 Md. App. 23, 31, 484 A.2d 652, 656 (1984)), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997). If the matter is one that jurors would be familiar with by virtue of general knowledge, expert testimony is not required. *Id.*, 674 A.2d 125–26 (citing Babylon v. Scruton, 215 Md. 299, 307, 138 A.2d 375, 379 (1958)). For a more detailed explanation of the common knowledge exception, see *infra* Part II.B.3.
7. *See infra* Part IV.B.1.
8. *See infra* Part IV.B.2.

only have provided prospective plaintiffs with guidance but also would have offered banks an incentive to establish a market for bank safety.[9]

I. THE CASE

Eighty-one year old Melvin Ray Schultz ("Schultz") passed away on July 5, 2005 due to declining health and heavy drinking.[10] Prior to his death, caregiver Robin Holbrook moved into Schultz's home and had her name added to his Bank of America checking account.[11] She then made multiple withdrawals.[12] Indeed, the evidence suggested that Holbrook may have continued to make withdrawals in the days following Schultz's death.[13] On July 11, 2005, Stephen Schultz's ("Stephen") then-attorney delivered a temporary restraining order that directed Bank of America ("Bank") to freeze Schultz's account.[14] According to Stephen, the Bank's branch manager told the attorney that he had frozen the account on this date, but a letter from the Bank confirming the order was dated July 13, 2005, two days after the attorney delivered the order.[15] Subsequently, Stephen, as personal representative of his father's estate, filed suit against the Bank in the Circuit Court for Baltimore County, alleging breach of contract and negligent handling of Schultz's account.[16]

At trial, Stephen presented three witnesses, including a handwriting expert, a friend of Schultz's, and Stephen's former attorney.[17] The handwriting expert compared the signature appearing on the signature card

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9. *See infra* Part IV.C. Bank safety refers to "financial institutions' resistance to fraud against its customers." Chris Jay Hoofnagle, *Towards a Market for Bank Safety*, 21 LOY. CONSUMER L. REV. 155, 156 (2008).

10. Schultz v. Bank of America, N.A., 413 Md. 15, 19–21, 990 A.2d 1078, 1081 (2010).

11. *Id.* at 20–21, 990 A.2d at 1081–82.

12. *Id.* There is some factual dispute regarding how Holbrook had her name added to Schultz's account. Stephen Schultz, Schultz's son and the petitioner in this case, alleged that Holbrook took advantage of his father in having her name added to Schultz's account, either through coercion or forgery. *Id.* at 18, 21, 990 A.2d at 1080, 1082. A branch manager, whose deposition was entered into the record at trial, claimed that both Schultz and Holbrook were present when Holbrook's name was added to the account. *Id.* at 23–24, 990 A.2d at 1083.

13. *Id.* at 21–22 & n.4, 990 A.2d at 1082 & n.4 (suggesting that Stephen Schultz made this argument based on several transactions that posted to Schultz's account following his death).

14. *Id.* at 18, 21–22, 990 A.2d at 1080, 1082. Stephen later testified that he had initially attempted to freeze the account both the day of and the day following his father's death, in person and over the phone, to no avail. *Id.* at 23, 990 A.2d at 1083.

15. *Id.* at 22 & n.3, 990 A.2d at 1082 & n.3. Bank records demonstrate that the Bank "posted" withdrawals from Schultz's account on July 12, 2005, but the line items for the withdrawals actually suggest that the Bank disbursed the funds prior to that date. *Id.* at 22 n.4, 990 A.2d at 1082 n.4.

16. *Id.* at 18–20, 990 A.2d at 1080.

17. *Id.* at 21, 990 A.2d at 1082. Stephen did not, however, present any testimony regarding a bank's standard of care when it adds an individual's name to an existing customer's account. *Id.* at 23, 990 A.2d at 1083.

used to add Holbrook's name to the account with several of Schultz's known signatures and concluded that Schultz's signature on the signature card did not match the other signatures against which it was analyzed.[18] Stephen also took the stand and pointed out uncharacteristic ATM activity and inauthentic signatures on checks drawn from Schultz's account.[19] Additionally, in his briefs to the court, Stephen identified several discrepancies in the signature card itself: Schultz's social security number was electronically printed, while Holbrook's was handwritten;[20] the signatures were transposed;[21] and the card was printed from a personal computer rather than a bank-generated document.[22] Following the Bank's unsuccessful motion for judgment, the Bank and Stephen both read portions of the Bank manager's deposition into evidence, which stated that both Schultz and Holbrook were present to add Holbrook's name to Schultz's account and described the procedures by which the manager verified their identities and signatures.[23] The jury found in favor of Schultz on both his negligence and breach of contract claims.[24]

The Bank appealed the jury verdict, and the Maryland Court of Special Appeals reversed on both counts, emphasizing that the negligence claim failed due to Stephen's failure to provide expert testimony that established the Bank's standard of care.[25] In reaching this conclusion, the intermediate appellate court declined to presume that a bank's standard of care and internal procedures for adding a name to an account fell within a lay juror's

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18. *Id.* at 21, 990 A.2d at 1082. Stephen's other two witnesses presented testimony on Schultz's declining health in the period leading to his death, as well as the temporary restraining order that Stephen's former attorney had delivered to the Bank. *Id.*

19. *Id.* at 23, 990 A.2d at 1083. Stephen admitted, however, that he did not know if his father wanted Holbrook to have any of the money in the account. *Id.*

20. *Id.* at 24 n.5, 990 A.2d at 1083 n.5.

21. *Id.* That is, Schultz's signature appeared next to Holbrook's social security number, while Holbrook's signature appeared next to Schultz's social security number. *Id.*

22. *Id.*; *id.* at 44, 990 A.2d at 1096 (Adkins, J., dissenting).

23. *Id.* at 23–24, 990 A.2d at 1083 (majority opinion). The parties read the manager's deposition into evidence because he was unavailable to testify at trial. *Id.* at 23, 990 A.2d at 1083. Stephen claimed that, due to inconsistencies in handwriting and signature placement, the signature card itself contradicted this testimony. *Id.* at 24 n.5, 990 A.2d at 1083 n.5.

After the presentation of this testimony, the Bank renewed its motion for judgment, arguing, among other things, that Stephen "had failed to prove the standard of care for his negligence claim because he had not produced expert testimony establishing the Bank's duty to Schultz." *Id.* at 24, 990 A.2d at 1083–84. The trial court denied the motion after concluding, as to this argument, that expert testimony was unnecessary to establish the standard of care on the facts of this case." *Id.* at 24–25, 990 A.2d at 1084.

24. *Id.* at 26, 990 A.2d at 1085. The jury awarded Stephen $23,475 for the breach of contract claim and $7,600 for the negligence claim, for a total of $31,075. *Id.*

25. *Id.* The court also found that Stephen failed to produce sufficient evidence to support his breach of contract claim. *Id.*

knowledge.[26] The Maryland Court of Appeals granted certiorari to determine whether an expert opinion is necessary to establish the standard of care for a bank when adding a customer to an account.[27]

II. LEGAL BACKGROUND

Maryland law imposes upon banks a duty of reasonable care toward their customers, both as a matter of common law and as a part of the Maryland Uniform Commercial Code due to the unique position that banks occupy in society.[28] To determine whether banks have breached that duty, expert testimony is often required to establish the relevant standard of care,[29] except in situations in which such information falls within the common knowledge of the average layperson.[30] Despite Maryland's recognition of a common knowledge exception, the boundaries of the exception have been unclear, leading one scholar to propose an alternative, more structured definition in the field of medical malpractice.[31]

A. Maryland Banks Owe a Duty of Reasonable Care to Their Customers

Maryland courts recognize that banks owe a duty of reasonable care to their customers. This tort duty initially arose out of the common law.[32] The Commercial Code also imposes a standard of care on banks to comply with reasonable commercial standards in their geographic area, and this duty is justified by the position that banks occupy in relation to the public welfare.[33]

1. The Common Law Imposes a Duty of Reasonable Care on Persons Who Hold Themselves Out as Having Knowledge or Proficiency in a Skilled Occupation

At common law, individuals holding themselves out as possessing requisite knowledge or proficiency in a skilled occupation had to act with reasonable care toward their customers.[34] To establish a cause of action for negligence under the common law, a plaintiff must prove the following: a

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26. *Id.*
27. *Id.* at 27, 990 A.2d at 1085.
28. *See infra* Part II.A.
29. *See infra* Part II.B.
30. *See infra* Part II.B.3.
31. *See infra* Part II.C.
32. *See infra* Part II.A.1.
33. *See infra* Part II.A.2.
34. Jacques v. First Nat'l Bank of Md., 307 Md. 527, 541, 515 A.2d 756, 763 (1986) (citing St. Paul at Chase Corp. v. Mfrs. Life Ins. Co., 262 Md. 192, 219–20, 278 A.2d 12, 26 (1971)).

legal duty owed to him by the defendant, a breach of that duty, a causal relationship between such breach and the harm suffered, and resulting damages.[35] In the absence of a legal obligation owed by the defendant to the plaintiff, no action in negligence exists.[36] Generally, tort duties are imposed as a matter of policy.[37] While contractual relationships and statutory text can independently impose duties upon a party, such obligations do not necessarily give rise to a duty and therefore a negligence action in tort.[38]

Courts consider various factors when deciding whether to recognize a tort duty in a particular situation, including the foreseeability of the harm to the plaintiff,[39] the nature of the harm likely to result,[40] the relationship between the parties,[41] and the possibility of preventing future harm.[42] Where the nature of an expected loss is primarily economic, courts focus less on the foreseeability of the harm and more on the relationship existing between the parties, thereby requiring a more intimate nexus before imposing liability.[43] Contractual privity, for example, is sufficient to satisfy this nexus.[44] Courts will also consider the nature of the business of the party who owes the potential duty when determining whether a tort duty is appropriate.[45] Where an individual holds himself out as possessing the requisite proficiency and knowledge in skilled occupations, the court may impose a duty to act with reasonable care,[46] thus establishing the existence of a cause of action for professional negligence.[47]

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35. Cramer v. Hous. Opportunities Comm'n, 304 Md. 705, 712, 501 A.2d 35, 39 (1985).

36. *Jacques*, 307 Md. at 532, 515 A.2d at 758.

37. *Id.* at 533–34, 515 A.2d at 759. Tort duties may also "arise from the public nature of the defendant's calling, from one's holding of a public office, from bailment, from prescription or custom, or from one's control of a dangerous thing." 3 FOWLER V. HARPER ET AL., HARPER, JAMES & GRAY ON TORTS § 18.1, at 757–58 (3d ed. 2007).

38. *Jacques*, 307 Md. at 534, 515 A.2d at 759.

39. Farmers Bank of Md. v. Chicago Title Ins. Co., 163 Md. App. 158, 170, 877 A.2d 1145, 1152 (2005) (quoting Sun 'n Sand, Inc. v. United Cal. Bank, 582 P.2d 920, 936 (Cal. 1978)), *aff'd sub nom.* Chicago Title Ins. Co. v. Allfirst Bank, 394 Md. 270, 905 A.2d 366 (2006).

40. *Jacques*, 307 Md. at 534, 515 A.2d at 759.

41. *Id.*

42. *Farmers Bank of Md.*, 163 Md. App. at 170, 877 A.2d at 1152 (quoting *Sun 'n Sand, Inc.*, 582 P.2d at 936).

43. *Jacques*, 307 Md. at 534–35, 515 A.2d at 759–60.

44. *Id.*

45. *Id.* at 541, 515 A.2d at 763.

46. *Id.*

47. *See generally* Jill Wieber Lens, *The (Overlooked) Consequence of Easing the Prohibition of Expert Legal Testimony in Professional Negligence Claims*, 48 U. LOUISVILLE L. REV. 53, 64–65 (2009) (discussing the development of professional negligence law).

Courts first applied professional negligence concepts in the medical malpractice context.[48] Pursuant to this doctrine, a professional defendant may be found liable if "he fails to 'exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.'"[49] Courts have applied this standard, which may take into account the industry custom,[50] to a variety of professional negligence contexts, including those involving engineers, lawyers, accountants, pilots, and plumbers.[51]

2. Maryland Banks Must Observe Reasonable Commercial Standards in Exercising Ordinary Care Pursuant to Statute

The Maryland Uniform Commercial Code imposes a duty of ordinary care on banks.[52] Even in the absence of language in the Commercial Code explicitly imposing liability on banks for specific actions, Maryland courts have held the duty of ordinary care generally imposed by the Commercial Code to be applicable.[53] For example, in *Taylor v. Equitable Trust Co.*,[54] Equitable transferred $20,000 belonging to Taylor to a third party's account after receiving an unendorsed treasurer's check and a handwritten letter

48. *Id.*

49. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 299A (1965)); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 12 (2010) ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.").

50. *See Jacques*, 307 Md. at 543–44, 515 A.2d at 764 (noting that to prove a bank's negligence the plaintiff needed to show that the defendant bank had "failed to exercise that degree of care which a reasonably prudent bank would have exercised under the same or similar circumstances," and that the plaintiff may offer proof of an industry standard to establish the applicable standard of care).

51. *See, e.g.*, Thomas v. Bethea, 351 Md. 513, 529–30, 718 A.2d 1187, 1195 (1998) (noting that claims of negligence against lawyers should be judged against the traditional standard applicable to professional negligence actions); Crockett v. Crothers, 264 Md. 222, 227, 285 A.2d 612, 615 (1972) (affirming the trial court's jury instructions that the defendant had "a duty to perform, which duty is that which any careful and prudent engineer in the Cecil County area or the tri-state area here would perform under like circumstances").

52. Taylor v. Equitable Trust Co., 269 Md. 149, 155, 304 A.2d 838, 841 (1973). Reasonable care is defined as "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." MD. CODE ANN., COM. LAW § 3-103(a)(7) (LexisNexis 2002).

53. *See Taylor*, 269 Md. at 155, 304 A.2d at 841–42 (noting that even though no specific textual provision of the Commercial Code addresses a bank's liability for negligently paying an item, "'[h]ints . . . abound'" within the Commercial Code as to that liability); *see also* COM. LAW § 1-103 (explaining that where the Commercial Code is silent, principles of common law remain applicable); *cf.* COM. LAW § 4-103(a) (noting that a bank is prohibited from disclaiming liability for "its lack of good faith or failure to exercise ordinary care").

54. 269 Md. 149, 304 A.2d 838.

purportedly written on behalf of Mr. Taylor.[55] At trial, Taylor contended that Equitable was liable for transferring the funds without proper authorization.[56] The trial court concluded that Taylor's own negligence in failing to assert his rights aggressively, rather than any negligence on the part of Equitable, had proximately caused the loss.[57] The Maryland Court of Appeals disagreed, determining that an action in tort could lie because Equitable failed to comply with reasonable commercial standards by requiring written instructions from Taylor personally.[58]

The statutory imposition of this duty of reasonable care upon banks aligns with the application of tort duties at common law. That is, because the nature of an expected loss in the banking context is primarily economic, a close examination of the relationship between the parties is necessary.[59] Since banks and their customers enjoy at least an implied contractual relationship,[60] the requirement for such a close relationship is met.[61] Additionally, banks operate through the use of public funds and "are invested with enormous public trust."[62] In fact, the State of Maryland requires an investigation evaluating the character, responsibility, and fitness of the directors and incorporators of a bank before the bank may receive its charter.[63] This investigation ensures that the officers of the bank

55. *Id.* at 153, 304 A.2d at 840. The factual scenario in the case was peculiar and complex. Frank Terranova, a business associate of Taylor's, allegedly wrote the letter at issue in order to reroute the money from the treasurer's check into his own possession. *Id.* at 151, 153 & n.3, 304 A.2d at 840 & n.3 (noting that the account to which Terranova requested that Equitable transfer the money was actually an alter ego of Terranova). Taylor had initially drawn the treasurer's check to make an investment in a hotel, but a person claiming to be Taylor later called Equitable to request that Equitable divert the funds to the account of Terranova's alter ego. *Id.* at 151–53, 304 A.2d at 840. Upon receiving the letter from Terranova, Equitable credited the $20,000 to this account, and unbeknownst to Taylor, Terranova then used the money to obtain a lease on the hotel in his own name rather than in Taylor's name. *See id.* at 153–54, 304 A.2d at 841 (suggesting this course of events). Taylor thereafter wired $40,000 through Equitable for this investment. *Id.* at 153, 304 A.2d at 841. Only later did Taylor discover that the account to which he had wired the additional money had been opened by Terranova and was also subject to his control. *Id.* at 153 n.4, 304 A.2d at 841 n.4. Hence, Terranova had usurped the entire $60,000 investment that Taylor thought he had made in the hotel property, using the money to invest in his own name and leaving Taylor with no interest in the property. *Id.* at 154, 304 A.2d at 841.

56. *Id.* at 151, 304 A.2d at 839.

57. *Id.* at 154, 304 A.2d at 841.

58. *Id.* at 158, 304 A.2d at 843.

59. *See, e.g.*, Jacques v. First Nat'l Bank of Md., 307 Md. 527, 534–35, 515 A.2d 756, 759–60 (1986) (requiring such an analysis when evaluating a bank's potential liability for negligently processing a loan application).

60. Magness v. Equitable Trust Co., 176 Md. 528, 531, 6 A.2d 241, 243 (1939).

61. *Jacques*, 307 Md. at 534–35, 515 A.2d at 759–60.

62. Djowharzadeh v. City Nat'l Bank & Trust Co. of Norman, 646 P.2d 616, 619 (Okla. Civ. App. 1982).

63. MD. CODE ANN., FIN. INST. § 3-203(b)(2) (LexisNexis 2003 & Supp. 2010); *Jacques*, 307 Md. at 542, 515 A.2d at 764.

"command confidence and warrant belief that the business of the proposed commercial bank will be conducted honestly and efficiently" and "[w]ill promote public convenience and advantage."[64]

To establish a breach of the standard of care in the banking context, a plaintiff must show, as in any other professional negligence case, that the defendant bank did not exercise the degree of care a reasonably prudent bank would have exercised under similar circumstances.[65] Where necessary, courts will admit evidence of the industry standard, often provided by an expert, to prove the applicable standard of care.[66]

B. Expert Testimony Is Generally Required to Establish the Standard of Care in a Professional Negligence Case

The requirement of expert testimony to establish a standard of care has evolved from an initial ban on non-firsthand testimony at common law[67] to generalized admissibility of such testimony.[68] While modern law generally permits expert testimony when it is helpful to the jury,[69] a common knowledge exception exists in Maryland that limits expert testimony when the subject matter falls within a lay jury's knowledge.[70] For this reason, expert testimony is generally not required to establish a standard of care if it falls within the common knowledge of the average layperson.[71]

1. The Use of Expert Testimony to Establish the Standard of Care Has Increased with Advances in Technology and Specialization

Expert testimony that is useful or helpful to the trier of fact and sheds light on a field of specialized knowledge is generally admissible.[72] While

64. FIN. INST. § 3-203(b)(2), (b)(3)(i); *see also Jacques*, 307 Md. at 542–43, 515 A.2d at 764 (noting that imposing a tort duty on the banking industry is consistent with the nature of the banking industry and that industry's relation to public welfare).

65. *Jacques*, 307 Md. at 543–44, 515 A.2d at 764.

66. *Id.* at 544, 515 A.2d at 764.

67. *See infra* Part II.B.1.

68. *See infra* Part II.B.1–2.

69. *See infra* Part II.B.2.

70. *See infra* Part II.B.3.

71. *See infra* Part II.B.3.

72. *E.g.*, FED. R. EVID. 702. At both the state and federal levels, however, the proposed expert testimony must satisfy certain criteria in order to be admitted by the court. In Maryland, to determine the admissibility of expert testimony, the trial judge must evaluate whether the testimony is a proper subject for expert testimony, whether the proposed expert is qualified to testify based on his education and experience, and whether the proposed testimony is competent. State v. Blackwell, 408 Md. 677, 695–96, 971 A.2d 296, 306–07 (2009). At the federal level, an expert witness must have sufficient "knowledge, skill, experience, training, or education" to assist the trier of fact. FED. R. EVID. 702. Courts have generally applied this standard liberally. *See, e.g.*, Kopf v. Skyrm, 993 F.2d 374, 377 (4th Cir. 1993) (acknowledging this liberal application of

modern standards tend to favor admissibility of expert testimony,[73] historically expert testimony did not enjoy such widespread acceptance. Rather, under early English common law, the witness had to have firsthand knowledge to testify in court—he had to "speak as a knower, not merely a guesser."[74] Under this framework, experts and other witnesses were not permitted to testify regarding the facts of the case unless they had personal knowledge of the event.[75]

Over time, however, the English common law began to develop ways to receive expert knowledge. For example, in early cases, some courts employed special juries, made up of a collection of persons "especially fitted to judge of the peculiar facts upon which the particular issue at bar turn[ed]."[76] While the extent to which the special jury's conclusions were binding is unclear, the court could certainly consider the special jury's statements in making its decision.[77] In cases involving trade regulations, the special jury's determination would often drive the judge or mayor's decision. For instance, Judge Learned Hand provided an example in which an individual presented a grievance to the mayor that a tradesman had sold him putrid meat.[78] In that situation, the mayor would then "summon persons of the trade of the man accused, as being well acquainted with the facts," and the verdict of these individuals would decide the outcome of the case.[79] Concurrently, courts also began to summon skilled persons to advise the court regarding certain issues of fact.[80] For example, in *Buller v.*

Rule 702). In the era following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), however, there has been an increasing emphasis on the "gatekeeping" role of the courts in excluding unreliable expert testimony. *Cf.* 509 U.S. at 592–94, 597 (proposing a framework for courts to use in assessing the reliability of proffered scientific expert testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (holding that *Daubert*'s relevancy and reliability requirements apply not only to scientific but also to nonscientific expert testimony); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (stating that neither *Daubert* nor the Federal Rules of Evidence requires courts to admit opinion evidence that lacks a sufficient connection to existing data).

73. *See supra* note 72 and accompanying text.

74. Lens, *supra* note 47, at 55 (quoting 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1917, at 1–2 (James H. Chadbourn ed., 1978)) (internal quotation marks omitted); *see* Adams v. Canon, (1622) 73 Eng. Rep. 117 (K.B.) 117 n.15 (Coke, J.) (noting that "it is not satisfactory for the witness to say, that he thinks or persuadeth himself").

75. *See* Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952) (analyzing the common-law restriction on witnesses who did not have firsthand knowledge of the event about which they sought to testify and concluding that early courts most likely sought to impose a personal knowledge requirement upon witnesses).

76. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

77. *Id.* at 41.

78. *Id.* at 41.

79. *Id.* at 41–42.

80. *Id.* at 42.

Crips,[81] the judge asked London merchants to advise him regarding the impact of a refusal to negotiate promissory notes.[82] Nonetheless, these early uses of expert witnesses merely allowed those witnesses to testify to the judge rather than to the jury.[83] After receiving the expert's advice, the judge would then instruct the jury regarding the expert's statements.[84]

As science and technology progressed, however, courts increasingly heard cases involving issues of which the jurors had only minimal knowledge.[85] Consequently, a rise in the use of expert testimony accompanied the growth of specialist occupations and professions and a developing belief that only experts could properly advise jurors regarding certain matters.[86] While initially experts testified only about facts or general information,[87] beginning in the 1730s, highly skilled individuals, such as surgeons, apothecaries, and physicians, typically proffered testimony regarding the mental or physical health of the individual in question.[88] Thus, an exception developed whereby expert witnesses could testify to the jury concerning "a class of facts about which expert persons alone could have knowledge" in order to "shed additional light" on the issue for the trier of fact[89] and the possible inferences to be drawn from those facts.[90]

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81. (1703) 87 Eng. Rep. 793 (K.B.).

82. *Id.* at 794.

83. Lens, *supra* note 47, at 56.

84. *Id.*

85. *Cf.* Ladd, *supra* note 75, at 417 ("The use of expert opinion has expanded with the continuous and rapid progress of science which has opened up new areas of scientific proof.").

86. Déirdre M. Dwyer, *Expert Evidence in the English Civil Courts, 1550–1800*, 28 J. LEG. HIST. 93, 114 (2007). For two early cases demonstrating judicial recognition that only skilled witnesses could properly advise jurors regarding certain issues, see *Folkes v. Chadd*, (1782) 99 Eng. Rep. 589 (K.B.) 590 ("[I]n matters of science, the reasonings of men of science can only be answered by men of science."), and *Coate's Case*, (1772) 98 Eng. Rep. 542 (K.B.) 542 (noting that "the only proper guide" to determine whether an individual should be admitted to a madhouse was the opinion of a physician).

87. *See, e.g.*, Pickering v. Barkley, (1648) 82 Eng. Rep. 587 (K.B.) 587–88 (testimony of experts admitted to determine whether pirates were considered perils of the sea); *see also* Dwyer, *supra* note 86, at 101 (noting additionally that "[t]he types of question that formed the substance of expert evidence expanded and developed in complexity over time").

88. Dwyer, *supra* note 86, at 101. This practice constituted "an advance in the types of inference involved, because experts were now being asked to apply their knowledge to an individual rather than simply to describe the general state of affairs." *Id.*

89. Lens, *supra* note 47, at 56 (quoting WIGMORE, *supra* note 74, § 1917, at 3–4) (internal quotation marks omitted).

90. Charles T. McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEX. L. REV. 109, 126 (1945).

2. Modern Expert Testimony Rules Generally Permit Expert Testimony Where It Assists the Trier of Fact

Modern evidence law favors the admission of expert testimony,[91] and state and federal evidence rules have generally codified this principle. Maryland Rule of Evidence 5-702, which governs the admissibility of expert testimony, states as follows:

> 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.[92]

The limited restrictions placed on expert testimony by the evidentiary rules generally create a preference for admissibility of expert testimony. In fact, "the only apparent restriction" within the evidence rules themselves seems to be that the testimony must aid the trier of fact.[93] Scientific advances have resulted in the admission of expert testimony in a variety of contexts.[94] For example, in Maryland, courts have permitted experts to testify regarding post-traumatic stress disorder following rape to demonstrate lack of consent,[95] the rental value of a particular piece of property based on the prior volume of business activity,[96] the standard of

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91. *See, e.g.*, State *ex rel.* Jones v. Recht, 655 S.E.2d 126, 136 (W. Va. 2007) (explaining that Federal Rule of Evidence 702, which sets forth the standard for admitting expert testimony, "'adopts a liberal stance on admitting expert testimony and favors admissibility'"); *see also supra* note 93 and accompanying text.

92. MD. R. 5-702. Although the language is not identical, this Rule largely mirrors the federal standard, which reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

93. Lens, *supra* note 47, at 56 (discussing Federal Rule of Evidence 702). As noted in *supra* note 72, however, courts must nonetheless carefully evaluate the reliability of expert testimony prior to its admission.

94. Ladd, *supra* note 75, at 417; *see also* 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 13, at 67 (Kenneth S. Broun ed., 6th ed. 2006) ("In [one study of] California Superior Court trials in the late 1980s, experts appeared in 86% of the trials; and on average, there were 3.3 experts per trial. Some commentators claim that the American judicial hearing is becoming trial by expert." (footnote omitted)).

95. State v. Allewalt, 308 Md. 89, 91, 517 A.2d 741, 741–42 (1986).

96. State Roads Comm'n v. Novosel, 203 Md. 619, 624–25, 102 A.2d 563, 565 (1954).

care necessary for operation of a multi-million dollar financial institution,[97] and the standard of care owed by banks when evaluating loan applications.[98]

Although expert testimony is generally admissible so long as it aids the trier of fact,[99] it does not follow that simply because expert testimony is admissible, it is also required.[100] Indeed, the common law continues to view experts with some suspicion for multiple reasons.[101] For instance, experts are permitted to testify about opinions in addition to facts,[102] and experts are the only witnesses permitted to accept more than nominal monetary payment for services.[103] Nevertheless, courts have recognized an apparent exception to this rule: Where a topic requiring special or uncommon knowledge forms a main issue in the case, experts must testify regarding that issue.[104] In most other cases, reflecting this continuing suspicion, evidence law limits expert testimony to cases in which the issue at bar is beyond the ken of the layperson.[105]

3. Maryland Courts Have Employed the Common Knowledge Exception, Only Requiring Expert Testimony in Cases in Which

97. Billman v. State of Md. Deposit Ins. Fund Corp., 88 Md. App. 79, 113, 593 A.2d 684, 700–01 (1991).

98. *See* Jacques v. First Nat'l Bank of Md., 307 Md. 527, 545, 515 A.2d 756, 764 (1986) (noting that the lower court had permitted use of an expert for this reason).

99. MD. R. 5-702; *see also supra* note 72 (discussing some judicially imposed limitations on expert testimony).

100. Maldonado v. Am. Airlines, 405 Md. 467, 480, 952 A.2d 294, 302 (2008) ("Obviously, the fact that expert testimony may be admissible, however, is not dispositive of the issue regarding whether it is required.").

101. *See* Wrobleski v. de Lara, 353 Md. 509, 523, 727 A.2d 930, 936 (1999) (internal quotation marks omitted) ("'[E]xpert testimony is viewed with some suspicion and . . . [t]he natural bias which the expert may have in favor of the party who employed and is paying him is the chief cause for the discredit that has been cast upon expert testimony as a whole.'" (second alteration in original) (quoting State v. Superbilt Mfg. Co., 281 P.2d 707, 713 (Or. 1955))).

102. Stephen D. Easton, *Can We Talk?: Removing Counterproductive Ethical Restraints Upon Ex Parte Communication Between Attorneys and Adverse Expert Witnesses*, 76 IND. L.J. 647, 658–61 (2001) (noting that unlike lay witnesses, the expert witness may testify about her opinions and inferences not limited to her own observations).

103. *Cf., e.g.*, *id.* at 655 (noting that "[e]xperienced trial attorneys tend to place witnesses into two categories," which are "the witnesses an attorney is stuck with and those she buys on the open market").

104. *See, e.g.*, Suburban Hosp. Ass'n v. Hadary, 22 Md. App. 186, 189–90, 322 A.2d 258, 260–61 (1974) (noting that expert witnesses are generally required in suits against a hospital for death or injury to a patient where the acts leading to the death or injury are beyond the common knowledge of a juror); *see also, e.g.*, Chi. Coll. of Osteopathic Med. v. George A. Fuller Co., 719 F.2d 1335, 1346 (7th Cir. 1983) (holding that expert testimony regarding an architect's standard of care was required because that information was not within the common experience of the jurors).

105. *See, e.g.*, Bomas v. State, 412 Md. 392, 423, 987 A.2d 98, 116 (2010) (noting that proffered expert testimony may be inadmissible where the topic of that testimony is within the understanding of the average layperson).

the Relevant Issue Does Not Fall Within a Jury's Common Knowledge

By demanding that expert testimony aid the trier of fact in understanding a particular fact or concept at issue in the case,[106] Maryland courts impliedly exclude expert testimony in cases in which the issues are within the jury's common knowledge.[107] For instance, in *Central Cab Co. v. Clarke*,[108] expert testimony was not necessary to establish legal malpractice when an attorney failed to notify his client of termination of his employment, resulting in a default judgment against the client.[109] Analogizing such an action to that of a dentist pulling the wrong tooth, the court concluded that the use of expert testimony to establish the applicable standard of care was unnecessary.[110] Similarly, in *Lowitt v. Pearsall Chemical Corp. of Maryland*,[111] the Court of Appeals held that expert testimony was not required to prove that an insurance agent complied with the standard of care when he failed to secure an insurance policy for his client.[112] Rather, since the insurance broker secured a policy that was freely acknowledged to be a "subterfuge," expert testimony was not necessary to establish the standard of care.[113]

In the banking context, Maryland courts have declined to hold that expert testimony is required as a matter of law to establish negligence. For example, in *Free State Bank & Trust Co. v. Ellis*,[114] the Court of Special Appeals determined that the common knowledge exception applied to a

106. MD. R. 5-702; *see also* Shemondy v. State, 147 Md. App. 602, 612, 810 A.2d 36, 42 (2002) (noting that Maryland Rule 5-702 allows the admission of expert testimony if it assists the trier of fact in determining a fact at issue).

107. *See e.g.*, Gilliam v. State, 331 Md. 651, 692, 629 A.2d 685, 706 (1993) ("'Expert testimony . . . will be inappropriate when the expert can add nothing to what the judge and jurors already know or could infer from the evidence.'"). Thus, the common knowledge exception posits that expert testimony is unnecessary to prove an issue within the general knowledge of the jury. *See* Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd., 109 Md. App. 217, 257, 674 A.2d 106, 125 (1996) (noting that expert testimony is only required where the inference is "'so particularly related to some science or profession that it is beyond the ken of the average layman'" (quoting Virgil v. "Kash N' Karry" Serv. Corp., 61 Md. App. 23, 31, 484 A.2d 652, 656 (1984))), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997); *see also* Crockett v. Crothers, 264 Md. 222, 224, 285 A.2d 612, 614 (1972) (acknowledging the existence of situations in which "negligence is so gross" or what was "done so obviously improper or unskillful" that expert testimony regarding the applicable standard of care is not necessary); Wood v. Toyota Motor Corp., 134 Md. App. 512, 517, 760 A.2d 315, 318 (2000) (noting that expert testimony is not required on matters that jurors would be aware of "by virtue of common knowledge").

108. 259 Md. 542, 270 A.2d 662 (1970).

109. *Id.* at 551, 270 A.2d at 667.

110. *Id.*

111. 242 Md. 245, 219 A.2d 67 (1966).

112. *Id.* at 254–56, 219 A.2d at 73.

113. *Id.* at 254–55, 219 A.2d at 73 (internal quotation marks omitted).

114. 45 Md. App. 159, 411 A.2d 1090 (1980).

situation in which the bank released a customer's collateral, in the form of a promissory note secured by a deed of trust, to a third party in exchange for a paper writing that was not collateral.[115] The case was "of the type that the average juror would know without expert testimony that banks simply do not ordinarily do what the . . . [b]ank did in this case."[116] Similarly, in *Saxon Mortgage Services, Inc. v. Harrison*,[117] the Court of Special Appeals determined that expert testimony was not necessary to establish the applicable standard of care that a reasonable bank would have exercised when the defendant bank accepted a check that was not endorsed with a payee's full name, thus violating the bank's internal training guidelines.[118] According to the court, such a determination was not "beyond the ken of the average lay[person]."[119]

In contrast to the cases above, where a complex procedure or medical judgment is at issue, Maryland courts have determined that expert testimony is necessary and that the common knowledge exception does not apply. For example, in *Wood v. Toyota Motor Corp.*,[120] the Court of Special Appeals considered the necessity of expert testimony in determining whether an automobile manufacturer had designed a car's

115. *Id.* at 163, 411 A.2d at 1092. The facts of *Ellis* were as follows: Ellis had obtained a loan from the bank by assigning a promissory note for $200,000, payable to Ellis by a third party, Wolman. *Id.* at 160, 411 A.2d at 1091. The note was secured by a deed of trust on Wolman's home. *Id.* The bank later released the promissory note as collateral at Wolman's request and substituted instead a "wraparound deed of trust" for $160,000, payable to Wolman from the purchaser of his home, Palmer. *Id.* at 161, 411 A.2d at 1091. Ellis later discovered that the bank had released his secured interest in the Wolman residence, receiving instead "'a piece of paper, one hundred sixty thousand dollars, from Dr. Palmer to Mr. Wolman.'" *Id.* at 161–62, 411 A.2d at 1091–92.

116. *Id.* at 164, 411 A.2d at 1093.

117. 186 Md. App. 228, 973 A.2d 841 (2009). The facts of *Harrison* were as follows: Following a fire on a property insured by Harrison and another party, Harrison submitted a claim to her insurer, who issued a check for $140,000 made payable to Harrison, the other insured individual, and Saxon Mortgage Services, the mortgagee on the property. *Id.* at 236, 973 A.2d at 845. The insurance company hand-delivered the check to Harrison. *Id.*, 973 A.2d at 846. Later, the law firm of Dunlap Grubb Weaver and Whitbeck ("the Dunlap firm") endorsed the check and presented it for deposit, and although Saxon Mortgage Services neither endorsed the check nor authorized anyone to endorse it on its behalf, "Saxon" was handwritten on the back of the check. *Id.* at 236–37, 973 A.2d at 846. The depository bank accepted the check without contacting Saxon to confirm the validity of the endorsement and thereafter transferred $140,000 to the Dunlap firm's bank account. *Id.* at 237, 973 A.2d at 846. Once Saxon learned that the check was deposited without its endorsement, it requested that the insurer provide it with a replacement payment for the check, but the insurer declined to do so. *Id.*

118. *Id.* at 290–91, 973 A.2d at 877–78. The court also relied on the bank's violation of the express instruction on the check that required any payee to endorse the back of the check such that the endorsement matched the payee's name on the front of the check. *Id.*

119. *Id.* (alteration in original) (quoting Wood v. Toyota Motor Corp., 134 Md. App. 512, 518, 760 A.2d 315, 318 (2000)) (internal quotation marks omitted).

120. 134 Md. App. 512, 760 A.2d 315.

airbag defectively.[121] The court concluded that the standard for evaluating effective airbag design was "well beyond the ken of the average layman,"[122] since the "correct resolution of that issue requires the application of science, mechanics, and engineering, rather than of matters that jurors 'would be aware [of] by virtue of common knowledge.'"[123] Similarly, in *Rodriguez v. Clarke*,[124] the Court of Appeals found that the plaintiff must present expert testimony to establish negligence because the gravamen of a medical malpractice action rests on the physician's failure to use necessary skills or procedures.[125] Such cases demonstrate that Maryland courts have limited the use of expert testimony to issues outside the common knowledge of the average layperson.

C. The Common Knowledge Exception's Unclear Boundaries Led One Scholar to Propose a More Thoughtful Test for Invoking That Exception in the Area of Medical Malpractice

Although seemingly intuitive, the common knowledge exception has proven difficult to apply with consistency and clarity.[126] Indeed, courts in many jurisdictions have not established clear boundaries for the common knowledge rule. For example, in *Patterson v. Arif*,[127] the Court of Appeals of Tennessee held that the common knowledge exception applies when the alleged "negligence is as blatant as a 'fly floating in a bowl of buttermilk' so that all mankind knows that such things are not done absent negligence."[128]

Despite the eloquence of this phrase, oft-provided examples of the common knowledge exception leave a great deal to inference and show these trite phrases to be "meaningless."[129] For example, in *Hubbard* ex rel. *Hubbard v. Reed*,[130] the Supreme Court of New Jersey determined that a

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121. *Id.* at 518, 760 A.2d at 319.

122. *Id.* (internal quotation marks omitted).

123. *Id.* (alteration in original).

124. 400 Md. 39, 926 A.2d 736 (2007).

125. *Id.* at 71, 926 A.2d at 755. Failure to produce expert testimony to demonstrate negligence in such a scenario may justify a court's decision to grant a party's motion for summary judgment where proof of negligence is otherwise lacking. *Id.* at 71–72, 926 A.2d at 755.

126. *See* Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51, 52 (2007) ("The facile simplicity of the easy 'common knowledge' expression, however, belies the challenging nature of the concept.").

127. 173 S.W.3d 8 (Tenn. Ct. App. 2005).

128. *Id.* at 12 (quoting Murphy v. Schwartz, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986)).

129. *See* King, *supra* note 126, at 54 ("That such deceptively reassuring, but basically meaningless 'tests' have proven popular is perhaps tacit acknowledgement of the absence of meaningful guidance from the courts." (footnote omitted)).

130. 774 A.2d 495 (N.J. 2001).

dentist who pulled the wrong tooth was "negligent as a matter of common knowledge,"[131] while a Massachusetts appellate court determined in *Anderson v. Attar*[132] that a dentist's alleged use of such a hard cement that required excessive force to detach from the patient's mouth was not a matter within the jury's common knowledge.[133] While plainly the action in the former case appears negligent, and the action in the latter case likely requires elucidation by someone familiar with dental techniques, no mention is made of the myriad possibilities that fall between these two ends of the spectrum, where "very real competing concerns" lie.[134]

Recognizing the innumerable situations that will fall between these two extremes,[135] Professor Joseph H. King has proposed a test for applying the common knowledge exception in medical malpractice cases.[136] Specifically, he has posited that, for the common knowledge exception to apply, one of the following two preconditions must be met:

> a. The specific conduct that allegedly constituted negligence was of such a nature that not only could an unlicensed layperson legally perform it without violating or offending applicable medical or health care licensure statutes or duly authorized regulations governing the practice of the health care professions, but also that such an unlicensed layperson would ordinarily be deemed competent and foreseeably expected to routinely perform such conduct; or,
>
> b. The specific decision making by the health care provider that allegedly constituted negligent conduct that caused the injury in question did not involve the exercise of uniquely professional medical skills, a deliberate balancing of medical risks and benefits, or the exercise of therapeutic judgment.[137]

Under Professor King's formulation, a finding of either precondition would permit a court to apply the common knowledge exception.[138]

The first precondition of Professor King's test would eliminate the need for expert testimony where a layperson may perform the activity at

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131. *Id.* at 500–01.

132. 841 N.E.2d 1286 (Mass. App. Ct. 2006).

133. *Id.* at 1287, 1289.

134. *See* King, *supra* note 126, at 52–54 (noting that while some cases discussing the common knowledge exception fall at either of these two extremes, it is often difficult to apply this exception in practice).

135. *Cf. id.*

136. *Id.* at 91.

137. *Id.*

138. *Id. But see id.* ("The fact that a plaintiff satisfies one of the preceding preconditions would not guarantee ipso facto that the court would apply the common knowledge exception. Rather, it would merely make it permissible for the court to do so . . . .").

issue without a license, and where that layperson would ordinarily be competent and "foreseeably . . . expected" to perform that activity.[139] Thus, under the first precondition, the common knowledge exception would not apply if relevant regulations and statutes forbid the conduct at issue.[140]

Even if a layperson may perform the activity without a license, the first precondition would not apply where a layperson would not possess the qualifications to routinely perform the activity or would not "foreseeably be expected to routinely do so."[141] For example, in *Lawrence v. Frost Street Outpatient Surgical Center, L.P.*,[142] the court found expert testimony unnecessary to evaluate the applicable standard of care that a medical professional should use in transferring a patient with a numb leg from a wheelchair to a vehicle.[143] The court determined that failure of the employee to properly assist the patient's transfer from the wheelchair to the car fell within the scope of the common knowledge exception,[144] stating that "[t]his is something ordinary individuals, untrained in the medical profession, do on a regular basis when picking up family and friends after surgery."[145] Accordingly, Professor King's first precondition would permit use of the common knowledge exception.[146]

Professor King's second precondition would permit use of the common knowledge exception even when a person must have a license to perform the conduct at issue.[147] Under this precondition, courts focus on the defendant's alleged negligent decision making.[148] If the decision does not involve "the exercise of professional skills, a balancing of costs and benefits, or the exercise of therapeutic judgment," courts may apply the

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139. *Id.* at 92.

140. *Id.* at 91. However, if the second precondition, discussed in more detail below, were satisfied, the exception could still apply. *See id.* (noting that only one precondition need be satisfied for the common knowledge exception to apply).

141. *Id.*

142. No. D042108, 2004 WL 2075401 (Cal. Ct. App. Sept. 17, 2004).

143. *Id.* at *5.

144. *Id.*

145. *Id.* By contrast, King discusses *Cunningham v. Riverside Health System, Inc.*, 99 P.3d 133 (Kan. Ct. App. 2004), as an example of a case in which the first precondition of his proposed test would not permit use of the common knowledge exception. King, *supra* note 126, at 93. In *Cunningham*, a nursing assistant twisted the patient's leg during postsurgical care for knee replacement surgery, causing her femur to break. *Cunningham*, 99 P.3d at 135. King opines that, under the first precondition, the common knowledge exception could not apply because "[w]hile helping a frail person to move in bed may be something lay persons routinely do, that is not so when the person attended is in the kind of precarious post-surgical orthopedic status we find in *Cunningham*." King, *supra* note 126, at 94.

146. *See* King, *supra* note 126, at 94–95 (explaining that "helping an outpatient move from a wheelchair to the car following outpatient surgery was what family and friends regularly do").

147. *Id.* at 95.

148. *Id.*

common knowledge exception.[149] For example, in *Callahan v. Cho*,[150] a physician left a needle fragment inside a patient's body following prosthetic hip surgery.[151] The suturing needle broke during the procedure, and after a futile search for the needle fragment, the doctor concluded that "it was better to leave the needle fragment in the tissue" than conduct additional, more invasive searching for it.[152] The court determined, in a manner consistent with the second precondition, that the doctor made a professional medical decision that included weighing the attendant risks and benefits to the patient, a decision that would not fall within the common knowledge of jurors.[153] Thus, Professor King's second precondition would not permit application of the common knowledge exception in this case.[154]

III. THE COURT'S REASONING

In *Schultz v. Bank of America, N.A.*,[155] the Maryland Court of Appeals held that a plaintiff alleging negligence must provide expert testimony to establish a bank's standard of care when adding a customer to an account.[156] Writing for the majority, Judge Greene stated that because the average layperson has not acted as a bank officer when adding a name to a customer's account, the complexity of the internal bank procedure at issue was beyond a layperson's common knowledge.[157] According to Judge Greene, although negligence is, at times, so obvious that it is easily recognizable by the average person,[158] the Bank's actions here were not sufficiently egregious and familiar to the public so as to eliminate the need for expert testimony regarding the standard of care.[159] Additionally, in light of changing bank procedures in the age of the Internet, as well as the

149. *Id.*

150. 437 F. Supp. 2d 557 (E.D. Va. 2006).

151. *Id.* at 559–60.

152. *Id.* at 560. Other than the broken needle, no additional complications occurred during the patient's surgery. *Id.*

153. *Id.* at 563; *see* King, *supra* note 126, at 97–99 (using *Callahan* as an illustration of a case that fell within the second precondition).

154. King, *supra* note 126, at 98–99.

155. 413 Md. 15, 990 A.2d 1078 (2010).

156. *Id.* at 27, 990 A.2d at 1085. The court reached the same conclusion regarding Stephen's breach of contract claim. *Id.* at 40, 990 A.2d at 1093.

157. *See id.* at 18, 34–35, 990 A.2d at 1080, 1090 ("To explain this process, a plaintiff must produce expert testimony from someone familiar with the process from a bank's perspective."). The *Schultz* court also expressed doubt that most laypeople would have experience in adding a name to a bank account, even from the perspective of a bank customer. *Id.* at 34, 990 A.2d at 1090.

158. *Id.* at 29, 990 A.2d at 1086.

159. *Id.* at 36, 990 A.2d at 1091 ("The alleged negligence in this case, however, involved internal banking procedures that the trier of fact could not be expected to appreciate.").

inability to convey hidden, internal bank procedures adequately through the customer experience, the court determined that expert testimony was necessary to establish the duty owed by the Bank to its customers when adding a name to an account.[160] Therefore, the court affirmed the judgment of the Court of Special Appeals.[161]

In so holding, the court distinguished the procedures inherent in adding a customer's name to an account from the clear negligence found in *Saxon Mortgage Services, Inc. v. Harrison*[162] and *Free State Bank & Trust Co. v. Ellis*.[163] Although recognizing that a bank may act in an obviously negligent manner that the plaintiff may not need to present expert testimony to demonstrate that the bank breached its duty, the court explained that *Harrison* and *Ellis* did not foreclose the use of expert testimony, particularly when proving the standard of care owed by a bank.[164] In the instant case, Stephen had provided a handwriting expert to discuss the alleged forgery of Schultz's signature, but the court concluded that Stephen had failed to provide evidence of the industry standard of care after implying that the Bank should have exercised "greater care to discover the forgery."[165]

Writing for the dissent, Judge Adkins asserted that the alleged negligence at issue was "well within" the understanding of a layperson.[166] While the majority had found that adding a customer's name to an account involved "numerous unknown procedures,"[167] the dissenting judges insisted that failure to enact and comply with security mechanisms and

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160. *Id.* at 35, 990 A.2d at 1090.

161. *Id.* at 26, 40–41, 990 A.2d at 1085, 1093–94.

162. For additional information on *Harrison*, see *supra* notes 117–119 and accompanying text.

163. *Schultz*, 413 Md. at 30–31, 990 A.2d at 1087–88. For additional information on *Ellis*, see *supra* notes 114–116 and accompanying text.

164. *Schultz*, 413 Md. at 30–32, 990 A.2d at 1087–89. According to the court, these prior cases had "demonstrate[d] the practice of using expert testimony to establish [that] standard." *Id.* at 32, 990 A.2d at 1089.

165. *Id.* at 33–34, 990 A.2d at 1089. In addition, the majority similarly rejected Stephen's breach of contract claim as insufficient because he had failed to establish the extent of the Bank's duty of care through expert testimony. *Id.* at 37, 990 A.2d at 1091–92. While Schultz was undeniably a customer of the Bank, and therefore owed a duty of ordinary care regardless of the contract's specific terms, the court stated that the mere existence of that duty was insufficient to put the claim before the jury. *Id.* at 39–40, 990 A.2d at 1092–93; *see also* MD. CODE ANN., COM. LAW § 4-103(a) (LexisNexis 2002) (stating that neither party to a banking contract can "disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care"). Rather, Stephen needed to prove the reasonable commercial standards prevailing in the banking industry in that geographic area, and by neglecting to provide expert testimony, he failed to do so. *Schultz*, 413 Md. at 40, 990 A.2d at 1093.

166. *Id.* at 41, 990 A.2d at 1094 (Adkins, J., dissenting). Chief Judge Bell and Judge Murphy joined Judge Adkins in dissent. *Id.*

167. *Id.* at 34–35, 990 A.2d at 1090 (majority opinion).

precautions is often visible and obvious.[168] The dissent distinguished the procedure at issue from complex transactions such as international wire transfers, instead emphasizing that "[w]hatever Bank of America's professional standard of care might have been, it logically could not have been less than a reasonable person's duty to take ordinary care in day-to-day life."[169] The dissenting judges expressed concern that imposing a requirement of expert testimony for a commonplace transaction would act as a financial barrier to a litigant—a barrier that the court should not impose lightly.[170] Thus, Judge Adkins and her dissenting colleagues would have reversed the judgment of the Court of Special Appeals.[171]

IV. ANALYSIS

In *Schultz v. Bank of America, N.A.*, the Maryland Court of Appeals held that the addition of a customer's name to a bank account involves internal bank procedures of which a juror has only minimal understanding,[172] thus obligating the plaintiff to present expert testimony to establish the bank's standard of care.[173] In so holding, the court erred because the procedures at issue were neither complex[174] nor opaque.[175] Thus, expert testimony on this issue was unnecessary.[176]

Additionally, by failing to articulate a reasoned test for the application of the common knowledge exception, the court's holding will likely lead to litigation inefficiency.[177] Specifically, the majority's vague standard improperly places the burden of loss on the plaintiff by requiring the plaintiff either to hire an expert witness or to bear the risk that the court will dismiss his suit for failure to establish the applicable standard of care.[178]

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168. *Id.* at 42, 990 A.2d at 1094 (Adkins, J., dissenting). For example, according to the dissent, if a bank allows someone to withdraw cash from an account based on an oral attestation that the account belongs to her, the lack of internal security procedures is evident. *Id.*

169. *Id.* at 43–44, 990 A.2d at 1095–96 (noting further that "[t]he jury could have concluded that a reasonable bank would carefully examine identification before adding a signatory to an account, in order to protect the assets of its borrowers").

170. *Id.* at 42, 990 A.2d at 1095. Further, the dissent noted that, "'[e]xcept for malpractice cases . . . there is no general rule or policy *requiring* expert testimony as to the standard of care, and this is true even in the increasingly broad area wherein expert opinion will be received.'" *Id.* at 43, 990 A.2d at 1095 (alteration in original) (quoting HARPER ET AL., *supra* note 37, § 17.1, at 605).

171. *Id.* at 45, 990 A.2d at 1096.

172. *Id.* at 27, 990 A.2d at 1085–86 (majority opinion).

173. *Id.*, 990 A.2d at 1085.

174. *See infra* Part IV.A.1.

175. *See infra* Part IV.A.2.

176. *See infra* Part IV.A.

177. *See infra* Part IV.B.

178. *See infra* Part IV.B.1.

To incentivize banks to develop innovative technology and establish a market for bank safety, the court should have instead placed the burden on the defendant bank.[179] The court could have achieved this result by adopting a clearer, more reasoned test for Maryland courts to use when applying the common knowledge exception.[180]

A. The Maryland Court of Appeals Erred in Requiring Expert Testimony to Establish the Bank's Standard of Care

The *Schultz* court improperly concluded that expert testimony is necessary to determine the Bank's standard of care because the alleged negligence at issue fell with the jury's common knowledge. Current Maryland law does not require expert testimony to establish the standard of care when the alleged negligence falls within the common knowledge of the average layperson.[181] Applying this principle, the *Schultz* court should not have required expert testimony because the negligence at issue involved neither complex[182] nor opaque bank procedures.[183]

1. Expert Testimony Was Not Necessary in the Instant Case Because Adding a Customer's Name to a Bank Account Does Not Involve Complex Procedures

The Court of Appeals erred in concluding that the addition of a customer's name to an account involved complex bank procedures. Maryland courts have previously addressed a range of scenarios in determining whether expert testimony is required to establish the standard of care owed by a defendant.[184] While the quintessential examples describing the range of the common knowledge exception notably sit at opposite ends of the spectrum, leaving a large gray area in the middle,[185] the bank procedures at issue here are distinguishable from cases in which courts have required expert testimony.

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179. *See infra* Part IV.B.2.

180. *See infra* Part IV.C.

181. *See supra* note 107 and accompanying text.

182. *See infra* Part IV.A.1.

183. *See infra* Part IV.A.2.

184. *Compare* Wood v. Toyota Motor Corp., 134 Md. App. 512, 518, 760 A.2d 315, 319 (2000) (requiring expert testimony in a negligent airbag design case), *with* Saxon Mortg. Servs., Inc. v. Harrison, 186 Md. App. 228, 289–290, 973 A.2d 841, 877 (2009) (holding that expert testimony was not required to establish a violation of the standard of care when a bank cashed an improperly endorsed check).

185. *See* King, *supra* note 126, at 52–53 (noting that while courts can easily apply the common knowledge exception to some "straightforward" cases at either end of the spectrum, a vast range of cases fall somewhere along the spectrum, making the applicability of the common knowledge exception more difficult to determine).

Maryland courts have, for example, required expert testimony to determine the applicable standard of care in defective design cases[186] and to demonstrate medical malpractice.[187] Unlike those cases, however, adding a customer's name to a bank account neither requires the highly specialized knowledge necessary to make informed decisions[188] nor the critical levels of training[189] or professional discretion.[190] For that reason, the process of adding a customer's name to an account can be easily distinguished from other areas in which Maryland courts have required expert testimony. While the average person does not have experience

186. *See Wood*, 134 Md. App. at 518, 760 A.2d at 319 (requiring a plaintiff to present expert testimony in a products liability case regarding a defectively designed airbag).

187. *See* Rodriguez v. Clarke, 400 Md. 39, 71, 926 A.2d 736, 755 (2007) (generally requiring expert testimony to prove negligence in medical malpractice cases).

188. *Compare* Schultz v. Bank of America, N.A., 413 Md. 15, 44, 990 A.2d 1078, 1096 (2010) (Adkins, J., dissenting) (noting that the jury was reviewing "a commonplace transaction involving common sense procedures," and therefore reliance on common knowledge should have been appropriate), *with Wood*, 134 Md. App. at 518, 760 A.2d at 319 (noting that "[t]he correct resolution of [the] issue [of defectively designed airbags] requires the application of science, mechanics, and engineering, rather than of matters that jurors 'would be aware [of] by virtue of common knowledge'" (fourth alteration in original)). No particularized knowledge of financial institutions and procedures, science, or engineering is necessary to inquire about whether a person is properly authorized to add a customer's name to an account. *Cf. Schultz*, 413 Md. at 44, 990 A.2d at 1096 (noting that "the jury was not being called upon to evaluate security protocols for an international wire transfer or mechanisms for operating 'sweep' accounts"). Rather, such actions seem to fall within the ambit of generalized account security—the absence of which is often obvious and within the common knowledge of a layperson. *See Schultz*, 413 Md. at 42–43, 990 A.2d at 1094–95 (noting, as a clear example of a missing security measure, that "if a bank allowed an unknown person to walk in and withdraw cash based only on her oral attestation that she was the named account holder, that would be a case of obvious negligence").

189. *Compare Banking: Career Guide to Industries, 2010–2011 Edition*, BUREAU OF LAB. STAT., http://www.bls.gov/oco/cg/cgs027.htm (last modified Dec. 17, 2009) (noting that tellers and other clerks in a bank usually only need a high school education), *with* MD. CODE ANN., HEALTH OCC. § 14-307 (LexisNexis 2009) (noting that to possess a medical license in Maryland, an individual must complete the requisite doctor of medicine degree from an accredited institution, one year of training in an accredited program, and an exam); BUS. OCC. & PROF. § 14-305 (LexisNexis 2010) (stating that to acquire a professional engineering license, an individual must graduate from an accredited four-year university with an engineering degree, have four years of work experience demonstrating competency, and pass two eight-hour written examinations on fundamentals and principles and practice of engineering). Banks may require financial managers, like the branch manager who allegedly met with Schultz and Holbrook at the Bank, *Schultz*, 413 Md. at 23–24, 990 A.2d at 1083, to achieve higher levels of education, but a specialty license generally is not required. *See Financial Managers: Occupational Outlook Handbook, 2010–2011 Edition*, BUREAU OF LAB. STAT., http://www.bls.gov/oco/ocos010.htm (last modified Dec. 17, 2009) (considering branch managers to be financial managers and noting that most employers require financial managers to have bachelor's degrees in finance, accounting, business administration, or economics, but not mentioning any required licenses or applicable statutory requirements).

190. *Cf. Schultz*, 413 Md. at 44, 990 A.2d at 1096 (Adkins, J., dissenting) (noting that the procedure at issue was a matter of "common sense").

designing an airbag[191] or deciding which kind of cement should be used to install a dental bridge,[192] the average person likely has experience in adding a name to a bank account.[193]

With increasing parental assistance to finance children's college educations,[194] increased cohabitation by couples before marriage,[195] and greater longevity of the elderly,[196] individuals in modern society are more likely to assist in the financial affairs of others.[197] With increased financial

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191. *See Wood*, 134 Md. App. at 518, 760 A.2d at 319 (holding that defective airbag design was beyond the common knowledge of jurors).

192. Anderson v. Attar, 841 N.E.2d 1286, 1289 (Mass. App. Ct. 2006) (requiring expert testimony because "[j]urors are not competent from their own knowledge and experience to determine the appropriate kind of cement to be used to install a dental bridge").

193. *Cf. infra* text accompanying notes 194–200. *But see Schultz*, 413 Md. at 34–35, 990 A.2d at 1090 (expressing doubt that most people have added another person's name to their bank accounts and stating that, even if they have, the average person has "not acted as *a bank officer*" in doing so (emphasis added)). While the majority may be correct that most laypeople have not acted in the role of a bank official when adding another person's name to their bank accounts, the transparent and obvious nature of the safeguards at issue, or lack thereof, dilute the force of this argument. *See infra* Part IV.A.2.

194. *See* Catherine Rampell, *How Americans Pay for College*, N.Y. TIMES BLOGS: ECONOMIX (Aug. 23, 2010, 2:40 PM), http://economix.blogs.nytimes.com/2010/08/23/how-americans-pay-for-college/ (noting that American parents on average paid for forty-seven percent of college expenses in 2010, up from forty-five percent in 2009).

195. *See* Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 7 (2007) (noting that while only 500,000 households were reported as unmarried, opposite-sex cohabiters in 1960, the number rose almost 1000% to 4.9 million in 2000). The 2000 Census reported 5.5 million unmarried-partner households, up from 3.2 million such couples in 1990. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1 (Feb. 2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf.

196. *See* JIAQUAN XU ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS, DEATHS: FINAL DATA FOR 2007, at 2 (May 20, 2010), *available at* http://www.cdc.gov/NCHS/data/nvsr/nvsr58/nvsr58_19.pdf (noting that the life expectancy in 2007 was 77.9 years, thereby "continuing a long-term rising trend").

197. The use of joint bank accounts, which a consumer can establish simply by adding another person's name to his account, illustrates this trend. *See* Kate Ashford, *Do One Thing: Open a Joint Checking Account*, BUNDLE (Oct. 14, 2010, 5:30 PM), http://money.bundle.com/article/do-one-thing-open-joint-checking-account-time-30-mins-or-less (noting that a person can establish a joint bank account either by opening a new account or adding a co-owner to an existing account); *Naming Names: Points to Consider Before Giving Friends or Relatives Access to Bank Accounts and Safe Deposit Boxes*, FED. DEPOSIT INS. CORP.: FDIC CONSUMER NEWS, http://www.fdic.gov/consumers/consumer/news/cnfall05/namingNamesPG10.html (last updated Jan. 22, 2009) (noting that adding an individual to an already-existing account establishes a joint bank account); *cf. Joint Versus Separate Accounts for Married* Couples, LAWYERS.COM, http://banking-law.lawyers.com/consumer-banking/Joint-Versus-Separate-Accounts-for-Married-Couples.html (last visited May 4, 2011) (noting that joint bank accounts are "the most common option for married couples"); Geoff Williams, *Joint Bank Accounts: What You Need to Know*, WALLETPOP (May 13, 2010, 1:30 PM), http://www.walletpop.com/2010/05/13/joint-bank-accounts-what-you-need-to-know/ (noting that consumers may establish joint bank accounts with their spouses or partners, children, or elderly parents).

commingling, it is likely that many individuals have either added or removed a name on their bank accounts.[198] Since courts do not require expert testimony on matters of which "the jurors would be aware by virtue of common knowledge,"[199] the increasing familiarity of the public with such issues belies the *Schultz* court's contention that the average layperson lacks such familiarity.[200] Therefore, the court erred in determining that these procedures were too complex to fall within the common knowledge of a layperson.

2. Expert Testimony Was Not Necessary in the Instant Case Because a Bank's Procedure for Adding a Person to a Bank Account Is Transparent

The *Schultz* court further erred in characterizing the addition of an individual's name to a bank account as part of "internal bank procedures that the trier of fact cannot be expected to appreciate."[201] Noting that the relevant "unknown" procedures might take place behind closed doors, the court determined that these procedures were not within the ambit of a juror's common knowledge because the average person had not acted as a bank officer in adding a name to a bank account.[202] But unlike the selection of appropriate tools for a dental procedure[203] or an international transaction or loan application decision,[204] the bank process at issue here is transparent.

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198. For example, a couple who decides to live together or marry may, instead of opening a joint account, simply add each other's names to their existing accounts. Neal Litherland, *How to Add a Spouse to a Bank Account*, EHOW.COM, http://www.ehow.com/how_5901183_add-spouse-bank-account.html (last visited May 4, 2011) (noting that many individuals simply add their spouse's name to an existing account after marriage rather than opening a joint account); *cf. Frequently Asked Questions: Student Accounts*, BANK OF AM., http://www.bankofamerica.com/deposits/checksave/index.cfm?template=lc_faq_staccts (select "Maryland" as state from the drop-down menu) (last visited May 4, 2011) (suggesting parent-child joint accounts after a child leaves for college); Paula Span, *A Better Bank Account*, N.Y. TIMES BLOGS: THE NEW OLD AGE (Mar. 4, 2011, 9:09 AM), http://newoldage.blogs.nytimes.com/2011/03/04/a-better-bank-account/ (quoting Charles Sabatino, a lawyer who is a director of the ABA's Commission on Law and Aging, that the joint bank account is "'everybody's default estate-planning tool because it's widely-known and commonly used'").

199. Wood v. Toyota Motor Corp., 134 Md. App. 512, 517, 760 A.2d 315, 318 (2000).

200. *See supra* note 193.

201. Schultz v. Bank of America, N.A., 413 Md. 15, 19, 990 A.2d 1078, 1080–81 (2010).

202. *Id.* at 34–35, 990 A.2d at 1090.

203. *See, e.g.*, Anderson v. Attar, 841 N.E.2d 1286, 1289 (Mass. App. Ct. 2006) (requiring expert testimony because a dentist's choice of which cement to use on a dental bridge did not fall within the realm of common knowledge).

204. *See, e.g.*, Billman v. State of Md. Deposit Ins. Fund Corp., 88 Md. App. 79, 113, 593 A.2d 684, 700–01 (1991) (noting that the standard of care owed in the operation of a multi-million dollar financial institution is not within the common knowledge of jurors and is thus a proper subject for expert testimony).

The plaintiff in *Schultz* alleged that the Bank acted negligently in failing to follow its own guidelines by checking identifications and verifying the signature card.[205] Such routine guidelines are open and obvious. Unlike a transaction that involves computer calculations and other procedures that cannot possibly take place before the eyes of the customer, the bank employee adding a name to an account merely verifies identification in the presence of the customer.[206]

Even if the procedure at issue did involve internal guidelines and compliance with specific security requirements, the *lack* of such procedures is likely to be readily observable.[207] Just as allowing an individual to withdraw money from a bank account based solely on an oral attestation that he was the account-holder would constitute obvious negligence,[208] permitting one person to access the account of another without properly inspecting the required documentation for evidence of fraud or impropriety similarly displays an open and obvious failure to comply with necessary security procedures.[209] For this reason, such procedures can be distinguished from more opaque processes, like the operation of a multi-million dollar financial institution, which inevitably involves discussions, deliberations, and calculations of risk that the public would not easily recognize.[210] Therefore, due to the transparency of the actual *decision* at issue, the Court of Appeals erred in requiring the plaintiff to present expert testimony in order to demonstrate the Bank's standard of care.

B. The Schultz *Court's Requirement of Expert Testimony in Routine Banking Transactions Improperly Burdens Prospective Plaintiffs and Fails to Maximize Efficiency or Prevent Future Loss*

By mandating expert testimony but failing to articulate a clear test for the common knowledge exception, the Court of Appeals improperly placed the burden of loss on prospective plaintiffs in cases involving routine

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205. *See Schultz*, 413 Md. at 21, 24 & n.5, 990 A.2d at 1082–83 & n.5 (noting that Stephen emphasized these facts in his brief to the court).

206. *See id.* at 44, 990 A.2d at 1096 (Adkins, J., dissenting) (noting that the jury in *Schultz* "was not being called upon to evaluate security protocols for an international wire transfer or mechanisms for operating 'sweep' accounts," but instead "was reviewing a commonplace transaction involving common sense procedures").

207. *Id.* at 42, 990 A.2d at 1094 ("Although security mechanisms may be 'internal procedures,' the lack thereof may be visible and obvious.").

208. *Id.*, 990 A.2d at 1094–95.

209. *See supra* note 207; *cf.* 31 U.S.C. § 5318(l) (2006) (noting that banks must reasonably comply with security procedures to verify the identity of any individual seeking to open an account).

210. *See, e.g.*, Billman v. State of Md. Deposit Ins. Fund Corp., 88 Md. App. 79, 113, 593 A.2d 684, 700–01 (1991) (noting that matters concerning such operations are not within the experience of the average juror).

banking transactions.[211] The resulting uncertainty regarding whether expert testimony is required in a particular case will likely result in an increased number of plaintiffs who must either bear the cost of paying for an expert or forego bringing suit.[212] Because the bank remains in the best position to prevent the loss and develop innovative methods to avoid future losses, the *Schultz* court should have required the banking industry to bear the burden of loss for banking negligence and fraud in such routine transactions.[213]

1. The Requirement of Expert Testimony in Schultz *Improperly Places the Burden of Loss on the Plaintiff*

Cases like *Schultz* that do not clearly define when the common knowledge exception applies create uncertainty for plaintiffs, thereby improperly forcing them to bear the risk of loss for the bank's negligence in routine transactions.[214] By concluding that expert testimony is only required where the issue at hand is "beyond the ken of the average layman,"[215] the Court of Appeals adhered to the vague, unclear standards that have traditionally defined the common knowledge exception.[216] The *Schultz* court seemed to struggle with the bounds of the exception,[217] ultimately stating that since most people have not acted as a bank officer in adding a name to a bank account, the issue in *Schultz* fell outside of a juror's common knowledge.[218] In so doing, the court did not clearly define when the common knowledge exception applies—like so many cases in the past[219]—and left prospective litigants with the same uncertainty about

211. *See infra* Part IV.B.1.

212. *See infra* Part IV.B.1.

213. *See infra* Part IV.B.2.

214. *Cf. supra* text accompanying notes 126–134 (discussing the lack of guidance often provided by courts when analyzing and applying the common knowledge exception).

215. Schultz v. Bank of America, N.A., 413 Md. 15, 28, 990 A.2d 1078, 1086 (2010) (quoting Bean v. Dep't of Health, 406 Md. 419, 432, 959 A.2d 778, 786 (2008)) (internal quotation marks omitted).

216. *Cf.* King, *supra* note 126, at 54 (noting that reliance on similar "meaningless 'tests' . . . is perhaps tacit acknowledgment of the absence of meaningful guidance from the courts" (footnote omitted)).

217. *Cf. Schultz*, 413 Md. at 34, 990 A.2d at 1090 (expressing uncertainty about the frequency with which people add names to their bank accounts).

218. *Id.* at 34–35, 990 A.2d at 1090.

219. *Cf. supra* text accompanying notes 126–134 (discussing the lack of guidance often provided by courts when discussing the common knowledge exception).

applicability of the common knowledge exception in cases that do not fall at the two extremes of the common knowledge spectrum.[220]

By requiring expert testimony in this situation and placing the burden of loss on the plaintiff, the *Schultz* court permitted the expense of expert testimony to deter potential plaintiffs from bringing suit (except in cases with a substantial expected payoff value).[221] Since expert witnesses must be hired—often at high prices—for the opinions they will provide at trial,[222] a requirement for such testimony imposes a heavy burden on the plaintiff.[223]

By requiring expert testimony without providing a clear standard for what constitutes "common knowledge,"[224] the *Schultz* court has forced prospective plaintiffs to play a high stakes game when deciding whether to hire an expert[225]: Either the plaintiff hires an expert and pays significant fees,[226] or he does not hire one and risks having his case dismissed for failure to establish the applicable standard of care.[227] In addition to this cost, the plaintiff will bear the loss caused by the bank's alleged negligence

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220. *See generally* King, *supra* note 126, at 52–54 (describing the "relatively straightforward" extremes of the common knowledge spectrum and the uncertainty resulting in the cases that fall between those extremes).

221. *Cf.* Mark E. Budnitz, *The Consequences of Bulk in Our Banking Diet: Bulk Filing of Checks and the Bank's Duty of Ordinary Care Under the 1990 Revision to the Uniform Commercial Code When It Honors Forged Checks*, 63 TEMP. L. REV. 729, 753–54 (1990) (noting that rational bank customers, on whom the Uniform Commercial Code had placed the burden to litigate and which generally required expert testimony to make a prima facie case, would not litigate "unless a substantial amount of money [was] at stake").

222. *See* Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 475 (2000) (describing expert witnesses as the attorney's "hired gun"); Hand, *supra* note 76, at 53 (noting that a serious objection to expert testimony arises because the expert "becomes a hired champion of one side"); *cf.* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000) (noting that while compensation for testimony is generally considered unethical, there is an exception for fees to expert witnesses).

223. *See* King, *supra* note 126, at 60 (noting that the expense of hiring an expert witness is an "onerous burden," particularly when the chances of recovering on the merits may be limited).

224. *See supra* text accompanying notes 215–220.

225. *Cf.* Hubbard *ex rel.* Hubbard v. Reed, 774 A.2d 495, 501 (N.J. 2001) (cautioning that while "plaintiffs may choose not to expend monies on an expert who will not testify at trial, there is some uncertainty in relying on common knowledge in professional malpractice cases" because plaintiffs run the risk of having their cases dismissed if the court determines that expert testimony is necessary).

226. *See, e.g.*, Lisa Fields, *7 Factors That Affect Expert Witness Billing Rates: Get the Best Deal*, ROUND TABLE GROUP: THE EXPERT ADVISOR (Aug. 15, 2007, 2:50 PM), http://www.roundtablegroup.com/expertadvisor/2007/08/expert-witness-billing-rate-factors.html (noting that the average expert retainer costs $4,000, and that some experts charge up to $1,000 per hour).

227. *See* Lens, *supra* note 47, at 66 (stating that "if the plaintiff fails to produce expert testimony, dismissal is appropriate because the plaintiff has no other way to demonstrate the standard of care and breach thereof").

if he does not win the case, even if he was not in the best position to prevent the loss.[228] Balancing his options, a reasonable plaintiff, unfamiliar with the contours of the common knowledge exception, would likely conclude that he could not proceed without expert testimony.[229] Aware of these higher fixed costs in litigation,[230] fewer plaintiffs are likely to bring suit for alleged negligence.[231] Instead, potential plaintiffs will bear the loss of alleged negligence individually rather than seeking redress through the tort system.[232]

2. The Risk of Loss Should Be Placed on the Banking Industry Because It Is in the Best Position to Prevent Future Losses Through the Development of Innovative Technologies

When banks are in the best position to take precautionary measures to avoid financial losses, such as when they act negligently toward an individual customer, banks should bear the risk of liability for that negligence.[233] Further, if banks face liability for their own negligence, they will have a greater incentive to implement innovative precautionary measures to prevent future losses.[234] By burdening the plaintiff with higher litigation costs, the *Schultz* court effectively reduced a defendant bank's

228. *Cf.* Budnitz, *supra* note 221, at 745–46 (noting that where the customer is an individual customer, the bank is consistently in the best position to bear the loss); Julianna J. Zekan, *Comparative Negligence Under the Code: Protecting Negligent Banks Against Negligent Customers*, 26 U. MICH. J.L. REF. 125, 148–49 (1992) (noting that banks are liable for paying out of a customer's account without that customer's authorization because "bank[s have] final control before executing the order of payment and can prevent loss by reviewing and confirming the customer's order").

229. *See supra* note 225.

230. *Cf.* Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 729 (2005) (noting that in medical malpractice litigation, required expert testimony contributes to high fixed costs and therefore expensive litigation).

231. *See* Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111, 113 (1991) (noting that "because litigation is costly, not every victim will find it profitable to bring suit").

232. *Id.* As a result, the deterrence of negligent behavior is dependent on the probability of those victims who file suit ultimately winning their potential lawsuits. *Id.*

233. *See* Budnitz, *supra* note 221, at 745–46 (noting that the law's objective of preventing injury can be achieved by imposing liability on the party who can achieve such reductions at the lowest cost and concluding that banks are consistently in the best position to bear the loss when that loss involves an individual customer).

234. *See infra* text accompanying notes 240–256. For example, similar to one scholar's suggestion in 1990 that technologies such as static signature verification systems could make bank detection of forged signatures and fraudulent instruments easier, thereby strengthening bank safety, Budnitz, *supra* note 221, at 749, placing liability on banks here could incentivize them to implement similar technologies in the signature card, rather than the check, context. Indeed, the imposition of liability on banks for paying on fraudulently endorsed checks contributed significantly to the safety of checks as a payment instrument. Budnitz, *supra* note 221, at 732.

incentive to change its behavior to avoid the loss, such as through the development of innovative technology, thereby misaligning incentives and creating an inefficient result.

Negligence is a measurement of reasonable conduct, and what is reasonable "is often a matter of costs of prevention compared with correlative risks of loss."[235] This principle suggests that the imposition of negligence liability is largely a balancing test. The burden is appropriately on the plaintiff where the costs of prevention outweigh the costs of the loss.[236] While a loss for an individual consumer can be catastrophic and represent a large percentage of overall wealth, banks and other large businesses can spread their loss among multiple consumers in the cost of services.[237] For example, some banks now charge fees to open checking or savings accounts or impose higher existing fees, all of which they can use to cover expenses.[238]

Placing the burden on banks to prevent such losses becomes even more important when considering the difficulties in the current financial markets. Identity theft is on the rise, with consumers falling prey to such attacks with increasing frequency.[239] If one presumes that some fraud is within the banks' control[240] and that it is appropriate to place liability for it on banks,[241] then the proper incentives will exist for banks to take the precautionary measures to prevent future fraud.[242] In *Schultz*, assuming

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235. Budnitz, *supra* note 221, at 767 (quoting R.I. Hosp. Trust Nat'l Bank v. Zapata Corp., 848 F.2d 291, 295 (1st Cir. 1988)) (internal quotation marks omitted).

236. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (stating in algebraic terms that "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL").

237. *See* Budnitz, *supra* note 221, at 745–46 ("Ability to bear the risk depends on the relative size of the loss—whether it is small or large in proportion to the party's total wealth, and whether that party can spread the loss by charging its customers a little more and still remain competitive.").

238. *See, e.g.*, Blake Ellis, *Bank Fee Whac-a-Mole: New Charges Hit Accounts*, CNNMONEY.COM (Sept. 25, 2010, 2:06 PM), http://money.cnn.com/2010/09/24/pf/new_bank_fees/index.htm (noting that banks have found new ways to charge customers fees since the enactment of the Card Act, which banned a variety of bank fees).

239. *See* Hoofnagle, *supra* note 9, at 179 & tbl.6 (providing a table to compare the incidence of identity theft and other fraud events at major banks).

240. *See id.* at 156–57 (noting that for there to be a market for bank safety, "one must assume that at least some fraud is within the control of banks"); *cf.* Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank, N.A., 374 F.3d 521, 526 (7th Cir. 2004) (noting that "[t]he risk of . . . getting away with . . . fraud is reduced" if banks have a duty to confirm a transaction's authorization).

241. *See supra* note 233; *cf.* Budnitz, *supra* note 221, at 755 (noting that assignment of liability for the purpose of realigning incentives involves a determination of which party is at fault for the conduct).

242. *Cf.* Budnitz, *supra* note 221 at 748–49 (noting that the loss reduction principle allocates liability in an attempt to incentivize the at-fault party to engage in technological innovation as a method of precaution).

that the facts as alleged by Stephen are true, Holbrook fraudulently added her name to Schultz's account.[243] Without the risk of liability in such circumstances, the Bank would have no incentive to guard against this type of loss,[244] yet this situation is precisely the type that consumers trust banks to prevent.[245]

The current economic climate provides further compelling justification to place the burden of loss on banks, thereby establishing a market for bank safety. It is well established that banks are tasked with acting in the public interest when handling consumer transactions, including investments and mortgages.[246] The current financial crisis is a perfect example of the disastrous effects that lax bank standards and marginal accountability can have upon consumers.[247] For example, it is unlikely that consumers receiving subprime mortgages from banks during the housing bubble would have approved of banks actively betting against their investments[248] or of later cutting corners when processing their now-delinquent mortgages.[249]

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243. *See* Schultz v. Bank of America, N.A., 413 Md. 15, 21, 990 A.2d 1078, 1082 (2010) (noting that Stephen alleged that Holbrook forged Schultz's signature to add her name to his account).

244. *Cf.* Budnitz, *supra* note 221, at 791 (noting that following one revision of the Uniform Commercial Code, the Code placed liability on consumers for forged checks and provided no incentive for banks to take precautions or develop new technologies to detect forgeries). Even the negative publicity that banks might receive in response to such a circumstance is insufficient to guard against loss because there is no alternative in the market for the banking industry. *Cf.* Hoofnagle, *supra* note 9, at 160 (noting that even though "some institutions advertise that they are more resistant to fraud or that they fully recompense victims for losses," they fail to "provide consumers with any objective means of distinguishing banks"). Indeed, legal liability is the tool that would establish such a market—and the resulting incentives to change behavior. *Cf.* Budnitz, *supra* note 221, at 732 (discussing a system of loss allocation in the context of check payment that contributed to making checks a safe payment method once banks began to face liability for payment on forged checks).

245. *Cf.* Bob Sullivan, *Know Your Rights on Bank Account Fraud*, MSNBC.COM (Aug. 12, 2005, 2:56 PM), http://www.msnbc.msn.com/id/8915217/ns/technology_and_science-security/ (noting that individual customers frequently hope that banks will refund their losses following instances of consumer fraud, even if they believe that it is unlikely that the banks will ultimately provide these refunds).

246. *See* Jacques v. First Nat'l Bank of Md., 307 Md. 527, 542–43, 515 A.2d 756, 763–64 (1986) (noting that imposing a tort duty on the banking industry is consistent with the nature of a bank's relation to public welfare).

247. *See, e.g.*, SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 156–57 (2011) (describing the relaxed banking regulations and resulting risky behavior by banks that led to the recent financial crisis).

248. *Cf.* MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE 79–81 (2010) (describing one Deutsche Bank trader's experience "shorting" subprime mortgages in the credit default swap market in 2005); Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1 (noting that many borrowers were "cajoled or pushed into risky mortgages that they never had the ability to repay").

249. *Cf.* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Oct. 31, 2010, at A1 (noting the frequent lack of review and verification when banks process delinquent mortgages).

Nonetheless, in recent times, banks have entrusted the credit and financial futures of their customers to employees who sign thousands of affidavits a day without apprising themselves of the relevant case details.[250]

If liability was appropriately placed on banks for such fraud and negligence in other routine transactions, the risk of loss would be placed on the party in the best position to create innovative technologies to prevent widespread loss in the future.[251] For example, like the automobile industry years ago, banks argue that they have no control over the risks consumers take.[252] But, a market for automobile safety evolved even though automobile manufacturers could not control how consumers drove.[253] Banks, however, are unlikely to develop safety technologies on their own,[254] particularly where the banking industry does not face liability for the absence of safety technologies because, quite simply, it is not worth the cost.[255] In the long run, if the cost of investing in new technology is less than the cost of bearing liability, banks will choose the most cost-effective option.[256] Therefore, banks should bear the burden of the loss for negligence in routine transactions involving individual consumers, and the *Schultz* court erred in improperly placing this burden not on the defendant bank, but on the plaintiff.

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250. *Id.* (noting that one employee of a debt-buying company claimed that she would sign as many as 2,000 debt-collection affidavits per day—an average of one affidavit every thirteen seconds).

251. *See* Budnitz, *supra* note 221, at 748–49 (noting that liability is often best placed on the party that is most likely to develop innovative methods of technology to prevent future losses).

252. Hoofnagle, *supra* note 9, at 157–58 (noting that several commentators have argued that consumers themselves may frequently be the cause of financial fraud when it occurs).

253. *Id.* at 158. The establishment of a market for automobile safety refers to the shift in thinking that occurred among automakers—a shift from a driver error-based approach to a safety and design-based approach. *Id.* at 159. While automakers once viewed driver error as "an excuse to avoid safety and design interventions," today they understand driver error "in more nuanced ways," in the context of helping drivers avoid mistakes. *Id.* This safety-based focus has become so integral to the automobile industry that vehicle safety is a frequent brand-based marketing tool. *See id.* at 159–60 (noting that, for example, Volvo has tied its brand name to vehicle safety).

254. *See id.* at 160 (noting that a market for bank safety is not likely to emerge on its own).

255. *Cf.* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 73 (1987) ("[F]inancial institutions often can reduce payment losses by taking the precautions that are presently available to them. . . . [F]inancial institutions can reduce losses through internal measures similar to quality control in manufacturing. Precautions, however, entail costs in money, time, and effort, which discourage . . . financial institutions from undertaking them.).

256. *See id.* at 74–75 ("Recent technological innovations, such as automated check processing, have altered the cost of precaution and will continue to do so in the future. The imposition of liability can create an incentive for the development of innovations that reduce both the cost of precaution and the frequency of losses." (footnote omitted)).

C. The Schultz *Court Should Have More Clearly Defined the Common Knowledge Exception to Reduce Litigation Inefficiency and Realign Incentives*

If the Maryland Court of Appeals had developed a more definitive test for the application of the common knowledge exception in cases involving a bank's standard of care in routine banking transactions, the court would not have reached an inefficient result. Rather than relying on the vague and circular phrase "beyond the ken of the average layman" to define the common knowledge exception,[257] the *Schultz* court should have instead applied a test similar to that proposed by Professor King.[258] Professor King's test, although initially developed for the field of medical malpractice, can be adapted to questions of bank negligence[259] and is consistent with current Maryland law addressing the common knowledge exception.[260] Using Professor King's test as a model for determining when to require expert testimony in Maryland bank negligence cases would have avoided the burden placed on plaintiffs by the *Schultz* decision, leading to less expensive litigation and more efficient deterrence of future negligent bank behavior.[261]

1. The Schultz *Court Could Have Adapted Professor King's Common Knowledge Test to Questions Involving Bank Negligence*

By adapting Professor King's test for the common knowledge exception to the bank negligence context, the Court of Appeals could have provided prospective plaintiffs with additional guidance regarding situations requiring expert testimony. Recognizing that "there is no guarantee that a court will apply the [common knowledge] exception to the particular facts in the case in question"[262] and the resulting uncertainty,[263] Professor King proposed a test for the common knowledge exception in the context of medical malpractice that could easily be translated to the context

257. Schultz v. Bank of America, N.A., 413 Md. 15, 28, 990 A.2d 1078, 1086 (2010) (quoting Bean v. Dep't of Health, 406 Md. 419, 432, 959 A.2d 778, 786 (2008)) (internal quotation marks omitted).

258. For a description of King's test, see King, *supra* note 126, at 56–57.

259. *See infra* Part IV.C.1.

260. *See infra* Part IV.C.2.

261. *See infra* Part IV.C.3.

262. King, *supra* note 126, at 67.

263. *Id.* at 76. In fact, despite recognizing the common knowledge exception, some courts still recommend that counsel engage an expert as a precaution, emphasizing the uncertainty inherent in the common knowledge exception. *See, e.g.*, Hubbard *ex rel.* Hubbard v. Reed, 774 A.2d 495, 501 (N.J. 2001) ("Indeed, the wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial.")

of bank negligence.[264] If applied to cases involving bank negligence, Professor King's test could similarly permit use of the common knowledge exception where the alleged negligent act satisfies one of the following preconditions: (1) an unlicensed person can legally, competently, and foreseeably perform the act,[265] or (2) the act does not involve a balancing of technical risks and benefits or the exercise of "uniquely professional" skills.[266]

While pursuant to Professor King's original formulation, the presence of either precondition would permit the court to use the common knowledge exception,[267] the *potential* availability of the exception does little to resolve uncertainty in the banking context following *Schultz*.[268] Indeed, a plaintiff in a banking negligence case may still be required to place his bets on the whims of a court if he does not put forth an expert[269] because the *Schultz* court failed to clarify when the common knowledge exception does apply.[270] Therefore, in the banking context, King's test should be adapted so that if a case satisfies either precondition, no expert testimony would be required to establish the standard of care. If it had adapted Professor King's test in this manner, the *Schultz* court could have developed a test for the common knowledge exception to provide guidance to plaintiffs in future bank negligence cases.

2. *Professor King's Adapted Test Is Consistent with Maryland Law Addressing the Common Knowledge Exception, and the Court of Appeals Could Have Applied That Exception Easily in* Schultz

The test developed above for applying the common knowledge exception in the context of bank negligence cases is generally consistent with existing Maryland case law. For example, in *Free State Bank & Trust*

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264. *See supra* text accompanying notes 135–153 (discussing Professor King's test in detail).

265. *See* King, *supra* note 126, at 91 (defining this precondition in the context of medical malpractice).

266. *Id.*

267. *Id.* ("The fact that a plaintiff satisfies one of the preceding preconditions would not guarantee ipso facto that the court would apply the common knowledge exception. Rather, it would merely make it permissible for the court to do so . . . .").

268. *See supra* text accompanying notes 226–232 (discussing the "high stakes" game that the plaintiff risks in filing suit in bank negligence cases following *Schultz*). Of course, courts should *permit* plaintiffs to advance expert witnesses where the testimony is helpful to the jury and the witness is otherwise qualified, but it is this author's contention that the choice to introduce such testimony in the context at issue in *Schultz* should rest with the parties themselves. *See supra* note 72 and accompanying text (discussing the general admissibility of expert testimony where it will aid the jury).

269. *Cf.* King, *supra* note 126, at 91 (noting that the satisfaction of a precondition does not "guarantee ipso facto" the application of the common knowledge exception).

270. *See supra* text accompanying notes 215–220.

Co. v. Ellis, the Court of Special Appeals held that a bank's improper release of a customer's collateral on a loan fell within the common knowledge exception.[271] Under the first precondition of the proposed test, a court would consider (1) whether a person must possess a license to perform the conduct at issue; and (2) if no license is needed, whether an unlicensed individual would be competently and foreseeably expected to perform such conduct.[272] Even in the absence of a licensure requirement,[273] a layperson probably would not be competently or foreseeably expected to be familiar with the largely opaque procedure related to securing a loan and releasing the related collateral.[274]

Nevertheless, the decision to release collateral would likely satisfy the second precondition, regarding the lack of balancing risks and benefits, as leaving a $200,000 loan unsecured[275] is notable precisely because the bank employee releasing the collateral presumably did not weigh the attendant risks and benefits.[276] Rather, if the employee had considered the risks and benefits, he likely would have known of the impropriety of the attendant decision.[277] Accordingly, the adapted common knowledge test would not require the use of expert testimony in this case.

The Court of Special Appeals's decision in *Saxon Mortgage Services, Inc. v. Harrison* is also consistent with Professor King's proposed common knowledge framework. There, the Court of Special Appeals held that a plaintiff did not have to provide expert testimony to establish a bank's negligence for accepting an instrument that was only partially endorsed.[278]

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271. 45 Md. App. 159, 163, 411 A.2d 1090, 1092 (1980). For a detailed explanation of *Ellis*, see *supra* notes 114–116 and accompanying text.

272. *See supra* text accompanying note 265.

273. *See Banking: Career Guide to Industries, 2010–2011 Edition*, *supra* note 189 (noting that many bank employees need not have a specialized degree or license to perform their jobs).

274. *Cf.* Robert A. Izard, Jr. & Kathleen M. Porter, *Issues in Litigation: Proof of Relief from Stay*, 2 J. BANK. L. & PRAC. 891, 902 (1993) (noting that where collateral is substituted, "whether the secured creditor is receiving the indubitable equivalent of its collateral should be based on expert testimony").

275. *Ellis*, 45 Md. App. at 160–61, 411 A.2d at 1092.

276. *See id.* at 163, 411 A.2d at 1092 ("[B]anks do not ordinarily release the collateral of a customer and take in substitution thereof a paper writing which is not collateral, and which does no more than allow the bank to collect monies due on the collateral and credit it to the account of another."). The decision to release collateral, thereby leaving a $200,000 loan unsecured, is an action *not* undertaken in the ordinary course, and the lack of expertise, skill, and decision making is clear. *See id.* at 164, 411 A.2d at 1093 ("[T]he average juror would know without expert testimony that banks simply do not ordinarily do what the . . . [b]ank did in this case.").

277. *Cf.* King, *supra* note 126, at 95 (emphasizing that the common knowledge exception may be appropriate in cases in which the purportedly negligent action did not require any expertise or reasoned decision making).

278. Saxon Mortg. Servs., Inc. v. Harrison, 186 Md. App. 228, 290–91, 973 A.2d 841, 877–78 (2009).

Since licenses are not generally required in the banking context,[279] the first precondition would focus on whether an unlicensed person would foreseeably and competently be expected to perform such an action.[280] Since it is unlikely that the average person has experience acting as a bank officer when paying on an instrument,[281] the first precondition would not be satisfied because the average person would not foreseeably be expected to act in this way.

The application of the common knowledge exception to *Harrison*, however, would likely be justified pursuant to the second precondition. The alleged negligent decision involved the bank's disregard of both its internal guidelines and express instructions written on the check itself.[282] Because the bank's disregard of existing internal bank procedures and the check's instructions did not require the exercise of uniquely professional judgment,[283] expert testimony would be unnecessary under the second precondition of Professor King's adapted common knowledge test.

Had it applied this adapted test in *Schultz*, the Court of Appeals would have reached a different—and correct—result. The alleged negligence in the case resulted from a bank employee improperly adding a name to an account by failing to properly examine identification.[284] Under the first precondition, the court would ask whether this conduct—the inspection of a signature card and other identification for the purpose of adding a name to a bank account—is conduct an unlicensed individual would be legally, competently, and foreseeably expected to do.[285] Performance of this conduct likely does not require a license,[286] but even so, it is unlikely that comparing and verifying signature cards and identification is something the average person would foreseeably be expected to do.[287]

Therefore, the second precondition of Professor King's adapted test, which provides that the alleged negligent decision must not require the exercise of uniquely professional skills or the weighing of risks and benefits, would need to be satisfied to trigger the common knowledge

279. *See supra* note 189.

280. *See supra* text accompanying note 272.

281. *Cf.* Schultz v. Bank of America, N.A., 413 Md. 15, 34–35, 990 A.2d 1078, 1090 (2010) ("Even if most people have added a name to their bank accounts, most people have certainly not acted as a bank officer adding a name to a customer's bank account.").

282. *Harrison*, 186 Md. App. at 290, 973 A.2d at 878.

283. *See id.* at 290–91, 973 A.2d at 878 (noting that the disregard of the procedures was not "'so particularly related to some science or profession'" as to require expert testimony (quoting Wood v. Toyota Motor Corp., 134 Md. App. 512, 518, 760 A.2d 315, 318 (2000))).

284. *Schultz*, 413 Md. at 43, 990 A.2d at 1095 (Adkins, J., dissenting).

285. *See supra* text accompanying note 240.

286. *See supra* note 189.

287. *See supra* note 281.

exception.[288] It is unlikely that the decision regarding the quality of inspection of the signature card and other identification involved the unique exercise of professional skills. Just as the complete release of collateral in *Ellis* was an infrequent occurrence, banks do not generally perform inadequate inspections of customer identification in the ordinary course of business.[289] Similarly, like the disregard of security procedures in *Harrison* was obvious, so too was the Bank's failure in *Schultz*.[290] This case was thus not one requiring the exercise of professional judgment or unique skills.[291] Therefore, taking the facts alleged by Stephen to be true, Professor King's adapted common knowledge test would not have required Stephen to provide expert testimony to establish the bank's standard of care, and the *Schultz* court would have thereby reached the correct result.

3. Adoption of an Adapted Formulation of Professor King's Common Knowledge Test Would Realign Bank Incentives and Lead to Greater Litigation Efficiency

If the *Schultz* court had adapted Professor King's common knowledge test to the banking context, the court would have properly aligned the incentives of the banking industry and created greater litigation efficiency.[292] Since a test of clearer application and greater predictability would enable plaintiffs to anticipate litigation costs, it might also increase the number of suits filed.[293] While increased litigation is not necessarily desirable,[294] shifting the responsibility for consumer losses incurred due to bank negligence in routine transactions onto banks will provide prospective plaintiffs with increased litigation certainty and will create incentives for banks to invest in technology and other security procedures.[295]

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288. *See supra* text accompanying note 241.

289. *Cf.* 31 U.S.C. § 5318(l) (2006) (noting that banks must comply with procedural guidelines requiring them to check the identification of customers seeking to open new accounts).

290. *See* Schultz v. Bank of America, N.A., 413 Md. 15, 42, 990 A.2d 1078, 1094 (2010) (Adkins, J., dissenting) (reasoning that "the lack [of procedures in *Schultz*] may be visible and obvious").

291. *See id.* at 44, 990 A.2d at 1096 (noting that the jury was "reviewing a commonplace transaction involving common sense procedures").

292. For a discussion of the misaligned incentives in the banking industry as a result of *Schultz*, see *supra* Part IV.B.2.

293. *Cf.* Hylton, *supra* note 231, at 120–26 (discussing the impact of financial considerations on the incentive to bring suit and recognizing that "when litigation is costly, it is no longer obvious that plaintiffs bring suit only when suit is socially desirable").

294. *Cf.* Casey L. Dwyer, *An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes*, 56 DUKE L.J. 611, 621 (2006) (noting that medical malpractice reform is often proposed as a means to decrease rising health care costs caused by high litigation rates).

295. *Cf. supra* Part IV.B.

With litigation rendered more affordable because it would not require expert testimony and the risk of case dismissal reduced as a result, it is likely that more individual plaintiffs harmed by bank negligence in routine transactions would be able to get their cases into court.[296] Indeed, the attendant increase in liability that banks would face in this situation would create an incentive for them to ensure compliance with standard procedures like checking signature cards when major account changes are proposed.[297] Instead of providing a pen to their employees to sign off on thousands of foreclosure papers a day following little to no review,[298] banks might be more willing to introduce and invest in safer, more appropriate procedures. Instead of allowing a person to add her name to a bank account without fully verifying the consent of the account-holder[299] or permitting banks to make loans to individual customers who did not have the ability to repay them,[300] banks, with their heightened burden, will have an incentive to enact safer procedures that more effectively protect the consumer.[301] Similar to the increased safety and prominence of checking as a result of placing the burden of loss on banks that pay forged checks,[302] the increased risk of loss that banks will face in negligence cases involving routine transactions will properly motivate them to minimize such fraud, like the addition of a name to a customer's account without proper authorization.[303] While more protection for consumers in the form of statutes and regulations is undoubtedly necessary to fully motivate banks to create a real market for bank safety, establishing a more definitive common knowledge exception is a small step in the right direction.

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296. *See* Hylton, *supra* note 231, at 113 (noting that "because litigation is costly, the probability of winning a lawsuit becomes an important consideration in the decision to bring suit").

297. *See supra* text accompanying notes 239–256.

298. Segal, *supra* note 249.

299. *See* Schultz v. Bank of America, N.A., 413 Md. 15, 21, 990 A.2d 1078, 1082 (2010) (noting Stephen's claim that Holbrook fraudulently added her name to Schultz's account).

300. *See* LEWIS, *supra* note 248, at 23–24 (noting that the banking industry frequently made loans to customers the banks knew could not repay them leading up to the most recent financial crisis).

301. *See* Cooter & Rubin, *supra* note 255, at 73–74 ("Legal rules that impose liability on consumers or financial institutions force them to include this potential liability in their calculus of costs, and thus weigh it against the cost of precaution. In economic terms, the liable party internalizes the social value of the precaution.").

302. Budnitz, *supra* note 221, at 732.

303. *Cf.* Cooter & Rubin, *supra* note 255, at 73–74 (noting that the risk of potential liability forces financial institutions to take such costs into consideration).

V. CONCLUSION

In *Schultz v. Bank of America, N.A.*, the Maryland Court of Appeals held that a plaintiff must present expert testimony to establish the standard of care owed by a bank when adding a customer's name to an account.[304] Characterizing the procedures at issue as internal and complex, the court determined that they did not fall within the common knowledge of the average person.[305] In so holding, the court mischaracterized the procedures under existing Maryland law[306] and failed to provide future plaintiffs with reliable guidance regarding the expert testimony requirement and the common knowledge exception, thereby improperly burdening the plaintiff and failing to maximize litigation efficiency.[307] Had the court provided a more structured test for the common knowledge exception,[308] the court would have better apprised prospective plaintiffs of their responsibilities at trial and provided an incentive for banks to adopt procedures and new technologies to prevent future negligence and fraud.[309]

304. 413 Md. 15, 27, 990 A.2d 1078, 1085–86 (2010).

305. *See id.* (noting that the case "involved alleged negligence in regard to internal bank procedures that the trier of fact could not be expected to appreciate without the aid of expert testimony").

306. *See supra* Part IV.A.

307. *See supra* Part IV.B.

308. *See supra* Part IV.C.1.

309. *See supra* Part IV.C.2–3.