



Castillo v. DuPont – The Role of the Jury in Post-Frye/Daubert Litigation



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When courts take the gate-keeping function beyond what is prescribed in *Daubert/Frye*, there is no role left for the jury. *Castillo v. Dupont* exemplifies the problems of proof that permeate many chemical exposure cases today.

John Castillo was exposed to Benlate, a fungicide formerly manufactured by DuPont, *in utero* as his mother walked past a pick-your-own produce farm during a critical stage of her pregnancy. This exposure caused John to be born with microphthalmia, a rare condition that causes severely underdeveloped eyes. At trial, Plaintiff's causation expert relied on several animal gavage studies and *in vitro* tests. The studies relied upon were the same type used by Dupont (and all chemical and drug companies) to get their products approved by regulatory agencies such as the EPA.

At the close of evidence, the jury weighed the credibility of all expert testimony and awarded John Castillo and his family \$4 million. Dupont appealed the award on the grounds that the scientific evidence presented by the Castillos, through Dr. Vyvyan Howard,¹ failed to meet the reliability standards set forth by *Frye*² and its progeny. The Third District Court of Appeals overturned the jury award on the grounds that the trial court did not properly assess the admissibility of Dr. Howard's opinions. On appeal, the Florida Supreme Court found that the Castillos' causation expert utilized commonly accepted methodology and that under *Frye*, the conclusions generated therefrom did not have to be commonly accepted.³ The Florida Supreme Court reinstated the \$4 million jury award that has now been paid to the Castillo family.

The years of litigation and numerous appeals endured by the Castillo family are becoming more and more common as courts struggle with their role as gatekeepers of scientific evidence. Many Plaintiffs who have been

injured by Benlate or other dangerous products do not even get the chance to present their case to a jury, as the trial judge often oversteps the bounds of *Daubert/Frye*, leaving injured children and their families without their day in court.

The *Castillo* decision should help to clarify some of the issues facing trial courts across the country. By redefining the application of *Frye*, the decision re-establishes the jury as the trier of fact. The jury has been the backbone of the American legal system since its inception. Yet prior to the *Castillo* decision, the misapplication of *Frye/Daubert* had begun to erode the jury's role.

As set forth in Federal Rule 702, "[i]f scientific, technical, or other specialised 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."

The U.S. Supreme Court has provided what is now known as the "trilogy," a set of three cases, to guide federal courts when determining the admissibility of expert testimony under rule 702. Some states, like Delaware, follow the federal admissibility guidelines where others, like Florida and California, adhere to *Frye*-type admissibility determinations. The first of the trilogy, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), involved the admissibility of scientific evidence in two consolidated cases in which parents alleged that their children suffered birth defects as a result of maternal ingestion and exposure to the prescription

medication Bendectin. The Plaintiffs had offered experts who testified that Bendectin could cause birth defects, while, on the other hand, the defendant submitted an expert's affidavit that maternal use of Bendectin had not been shown to cause birth defects. The district court granted summary judgment, and the Ninth Circuit affirmed, in favor of the defendant, finding that the plaintiff's evidence did not meet *Frye's*⁴ "general acceptance" standard for the admission of expert testimony.

The U. S. Supreme Court reversed and held that the Federal Rules of Evidence, not *Frye*, governed the admissibility of scientific evidence.⁵ Essentially, the Court found, the rules of evidence adequately limited the admissibility of expert testimony as the trial court, in its gatekeeping function, had to ensure that scientific testimony or evidence be not only relevant, but also reliable. In ensuring reliability, the Court emphasized that the test for admissibility of expert evidence under Rule 702 was a "flexible one."⁶ Consistent with its emphasis on "flexibility," the Court provided a nondefinitive list of "general observations" to assist a trial court in its inquiry of the reliability of the scientific evidence: (1) whether the scientific theory can be tested; (2) whether the theory has been subjected to peer review; (3) the consideration of the known or potential rate of error associated with the technique; and (4) whether the methodology has gained general acceptance in the relevant community.⁷

Notably, in addition to providing that the above list be an inclusive one, the Court took pains to fortify the flexibility of the federal rules throughout the opinion. Foremost, the Court noted that inasmuch as there are no certainties in science, "it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty."⁸ In other words, an expert witness in the courtroom will not be held to a higher standard of exactness than that which governs the scientific process outside the courtroom, a sensible and reasonable approach. The Court also made sure to mention that the trial court's inquiry must be focused "solely on principles and methodology, not on the conclusions that they gen-

erate."⁹ The Court then evoked the time-tested tools of the American adversarial system, namely the opportunity for vigorous cross-examination, the actual presentation of evidence, and ample instruction on the burden of proof, as the proper means of emasculating shaky but admissible evidence.¹⁰

Subsequent to *Daubert*, in *General Electric Company v. Joiner*,¹¹ the Supreme Court provided the standard for appellate review of admissibility rulings by district courts. The plaintiff in *Joiner* alleged exposure to polychlorinated biphenyls (PCBs) and derivative "furans" and "dioxins" in the course of his job as an electrician for a utility company. The plaintiff, who had a history of cigarette smoking and a family history of lung cancer, attributed his development of small-cell lung cancer to exposure to PCBs, and submitted expert testimony to that effect. The district court ruled, *inter alia*, that the plaintiff's expert testimony failed to demonstrate a link between exposure to PCBs and small-cell lung cancer and was thus inadmissible as it did not rise above "subjective belief or unsupported speculation." The Eleventh Circuit reversed and held that decisions excluding expert testimony should be reviewed under a "particularly stringent standard of review."¹²

The Supreme Court reversed the Eleventh Circuit and held that an abuse of discretion standard was appropriate because of the district court's unique position to consider evidence presented at trial.¹³ The Court, in an oft-cited refinement of *Daubert*, stated that "conclusions and methodology are not entirely distinct from one another[.]" and explained that:

Trained experts commonly extrapolate from existing data. But nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."¹⁴

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Based on these facts, the Court found that the district court did not abuse its discretion in excluding the expert testimony. In no way, however, did the Court radically change *Daubert* and the principles enunciated therein. Indeed, this very point compelled Justice Stevens to write:

[I]t bears emphasis that the Court has not held that it would have been an abuse of discretion to admit or deny the expert testimony. The very point of today's holding is that the abuse-of-discretion standard of review applies whether the district judge has excluded or admitted evidence. And nothing in either *Daubert* or the Federal Rules of Evidence requires a district judge to reject an expert's conclusions and keep them from the jury when they fit the facts of the case and are based on reliable scientific methodology.¹⁵

(Stevens, J., concurring in part and dissenting in part).

More recently, the Court decided the last of the trilogy, *Kumho Tire Co. v. Carmichael*,¹⁶ where the issue was whether the principles of

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