

Kumho Tire Co., Ltd. v. Carmichael

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The U.S. Supreme Court considered an appeal by the defendant, Kumho Tire, in a products liability action. The appeal resulted from a ruling by the Court of Appeals in the Eleventh Circuit that overturned the district court's exclusion of expert testimony. The plaintiff's expert had sought to testify regarding the reasons for a tire failure and blowout. The subsequent accident resulted in personal injury and the death of a passenger in the plaintiff's vehicle. The Supreme Court held that expert testimony, whether based on professional studies or on personal experience, is subject to the same standard of scrutiny for relevancy and reliability. This decision resolved a conflict that had arisen among the circuit courts of appeal with respect to this issue. The article first outlines the Court's decision, then considers the implication the decision has for the admissibility of expert opinion testimony in future cases.

The U.S. Supreme Court on March 23, 1999, issued its opinion in the case of *Kumho Tire Co., Ltd. v. Carmichael*.¹ The Court ruled that expert testimony, sought to be admitted under Federal Rules of Evidence, Rule 702 (Rule 702), which is based on "technical" and "other specialized" knowledge is subject to the same relevancy and reliability "gatekeeping" tests first announced for "scientific" knowledge by the Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*² The Court concluded that a trial court "may [emphasis in original] consider one or more of the more specific

factors that *Daubert* mentioned when doing so will help determine that testimony's reliability."³ The test of reliability will vary according to the needs of each case and is not necessarily or exclusively governed by the *Daubert* factors. The Court emphasized that the test should be flexible, because the law "grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determinations."⁴ Only if the trial judge abuses his discretion, either with respect to the choice of test to use or with respect to his ultimate decision to admit or exclude, will a Court of Appeals have reason to upset the decision.

Case Background

The plaintiff, Patrick Carmichael, was involved in an accident on July 6, 1993,

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that resulted in the death of one passenger in his vehicle and serious personal injury to other passengers. The accident followed the blowout of the right rear tire of Carmichael's minivan. He brought a diversity suit (action brought in federal court when parties are from different states and the controversy involves more than \$10,000.00) against the manufacturer and distributor of the tire (collectively, Kumho Tire) claiming that the tire was defective. Carmichael's case rested in significant part on the deposition testimony of Dennis Carlson, Jr., an expert in tire failure analysis. Carlson's testimony concluded that the blowout was the result of a defect in the tire's manufacture or design that caused its outer tread to separate from its inner steel-belted carcass prior to the accident. Carlson's opinion rested on the premise that even if the tread depth of the outer rubber had worn away (in fact, the original 11/32 of an inch depth when new had worn to depths that ranged from 3/32 of an inch along some part of the tire to nothing at all along other parts), the tire's carcass should stay bound to the inner side of the tread for a significant period of time. Carlson further concluded that the separation of the tire components had caused the blow out.

At trial, Kumho Tire moved to exclude Carlson's testimony on the grounds that his methodology failed to satisfy the reliability requirements of Rule 702. The district court examined Carlson's methodology in light of the reliability-related factors established in *Daubert*. Acting as "gatekeeper," the district court examined Carlson's methodology to determine

whether the theory was testable, whether it had been a "subject of peer review or publication," whether it possessed "known or potential rate of error," and whether it had a "degree of acceptance... within the relevant scientific community."⁵ The district court found that all these factors argued against the reliability of Carlson's methods and granted the defendant's motion to exclude the evidence and the defendant's motion for summary judgment.

The plaintiff asked for reconsideration, arguing that the district court's application of the *Daubert* factors was too "inflexible." The district court agreed to reconsider its action and found that the four *Daubert* factors were simply illustrative and that other factors could argue in favor of admissibility. The court found that the "visual-inspection method" utilized by Carlson had widespread acceptance in the industry for some relevant purposes. The court, however, found insufficient indications of reliability with the methodology employed by Carlson in analyzing the data obtained in the visual inspection and the scientific basis, if any, for such an analysis. The court affirmed its earlier order, excluded the testimony and granted summary judgment.

The Eleventh Circuit reversed the district court, finding that "the Supreme Court in *Daubert* explicitly limited its holding to cover only the 'scientific context,'" and finding that a "*Daubert* analysis" applies only when an expert relies on the application of scientific principles, which it distinguished from "skill- or experienced-based observations."⁶ Kumho Tire then petitioned for *certiorari*, to determine from the Supreme Court if a trial

court “may” consider *Daubert* factors when determining the admissibility of an engineering expert’s testimony. The Supreme Court granted the petition to resolve uncertainty that existed in the lower courts regarding whether, or how, *Daubert* applies to expert testimony based on “technical” or “other specialized” as opposed to “scientific” knowledge referred to in Rule 702.

U.S. Supreme Court Clarifies *Daubert*

Justice Breyer delivered the opinion for the unanimous Court with respect to Parts I and II of the decision, which clarified the obligation of the trial court with respect to reliability testing and emphasized the flexibility afforded federal trial courts with respect to their decisions to admit or exclude expert testimony. As he did in the *Joiner* decision, Justice Stevens dissented with that part (Part III) of the otherwise unanimous decision that analyzed the trial court’s decision to exclude the questioned evidence.

The Supreme Court began by noting that *Daubert* held that Rule 702 imposed a special obligation upon a trial judge to “ensure that any and all scientific testimony. . . is not only relevant, but reliable.”⁷ The question before the Court in this case, is whether this “gatekeeping” obligation applies only to “scientific” testimony or to all expert testimony. The Court found that it applies to all expert testimony. The language of Rule 702 makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. The Court explained that *Daubert* referred

only to “scientific” knowledge, “because that [wa]s the nature of the expertise” at issue.⁸ Quoting *Daubert* (at 589-90), the Court noted that in Rule 702 the word “knowledge,” and not the words that modify that word, “establishes a standard of evidentiary reliability.” All expert witnesses, not just “scientific” experts, are granted testimonial latitude by Rules 702 and 703 that is not afforded other witnesses on the assumption that the experts’ opinions will have a reliable basis in the knowledge and experience of their disciplines. Experts of all kinds tie observations to conclusions through the use of “general truths derived from specialized experience.” Whether the specific expert testimony focuses on specialized observations, the translation of those observations into theory, a specialized theory itself, or the application of such theory in a particular case, the expert’s testimony will often rest “upon an experience confessedly foreign in kind to the jury’s own.”⁹ *Daubert*’s general principles apply to all expert testimony described in Rule 702. The expert must establish a valid connection to the pertinent inquiry as a precondition to admissibility of the proffered testimony. When the factual basis, data, principles, methods or their application in a particular case are called sufficiently into question, the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of [the relevant] discipline.”¹⁰

The Court then emphasized that specific factors enumerated in *Daubert* “may” be considered by a judge in exercising his gatekeeping function. Because there are many different kinds of experts

and many different kinds of expertise, the Court noted that the relevant reliability assessment must have a flexible focus. The *Daubert* decision itself makes it clear that the factors it mentions do *not* constitute a “definitive checklist or test.”¹¹ Rather, the gatekeeping inquiry must be tied to the facts of a particular case. The Court explained that in some cases, for example, the claim made by a scientific witness may never have been the subject of peer review if the particular application had not previously been of interest to the field. The mere presence of *Daubert*’s general acceptance factor may not help to show that an expert’s testimony is reliable where the discipline itself lacks credibility, as for example theories in the so-called generally accepted principles of astrology.

The objective of the gatekeeping function is to ensure the reliability and relevancy of expert testimony. Whether the expert is basing his testimony on professional studies or personal experience, the trial court must be sure that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”¹² The Court concluded its analysis of the issues by stating that the “trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert’s relevant testimony is reliable.”¹³ The *Joiner* decision established the abuse-of-discretion standard as the standard of review for evidentiary issues. This allows trial

judges the discretionary authority to both avoid unnecessary “reliability” proceedings in ordinary cases in which the reliability of an expert’s methods is properly taken for granted and to require appropriate proceedings in the less usual or more complex cases in which cause for questioning the expert’s reliability arises. The Federal Rules of Evidence seek to avoid “unjustifiable expense and delay” as part of the search for “truth” and the “just determination” of proceedings.¹⁴ Trial judges thus have broad latitude to determine whether or not to apply *Daubert* factors as reasonable measures of reliability in a particular case.

Supreme Court Examines the District Court’s Actions

Justice Breyer writing for an eight-to-one majority concluded, as the Court did in the *Joiner* case, by reviewing the district court’s rulings, in light of the decision just announced to explain how a trial judge “may” consider *Daubert* factors in future cases. He began by noting that the district court did not doubt Carlson’s qualifications. Rather, it excluded the testimony because it first doubted, then found unreliable, the methodology Carlson employed in analyzing the data he obtained from the visual inspection and the scientific basis, if any, for such an analysis.¹⁵ The specific issue before the court was not the reasonableness *in general* of the use of the visual and tactile inspection to determine the cause of the tire’s failure. Rather, it was the reasonableness of using this approach, along with Carlson’s method of analyzing the data obtained, to draw a conclusion re-

garding “*the particular matter to which the expert testimony was directly relevant*” (emphasis in original).¹⁶ The Court explained that Carlson conceded during his testimony that the tire in question had traveled far enough that some of its tread had been worn badly; it should have been taken out of service; it had been inadequately repaired for punctures; and it bore some of the very marks Carlson said indicated abuse through overdeflection, not a defect. The question was whether the expert could reliably determine the cause of this tire’s separation.¹⁷ The record gave no indication that other experts in the industry used the particular two-factor test Carlson used. It found no reference to any articles or papers introduced into evidence to help validate Carlson’s approach. The Court also pointed to numerous apparent inconsistencies in Carlson’s own observations and the methodology he chose to apply, without any apparent attempts at rehabilitation. Carlson’s only apparent claim to the accuracy of his methods was his own assertion that they were accurate. The Court pointed out that as it noted in *Joiner*, “nothing in either *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.”¹⁸ Taking all of the above into account, the Court found that the district court was justified in questioning the reliability of Carlson’s approach. The attorney representing the plaintiff did not offer, according to the record, sufficient evidence to support the expert’s opinion testimony, based either on *Daubert* factors or any other set of reasonable reliability criteria.¹⁹

Justice Stevens dissented from the majority opinion regarding its analysis of whether the trial judge abused his discretion, because he felt this issue was not before the Court. He wrote that the Court fully addressed the question it granted *certiorari* to decide in Parts I and II of the decision when it decided that the *Daubert* factors *may* be considered in all expert testimony cases.

Discussion

The decision in *Kumho* represents the next step in an evolution of the principles guiding the admission of expert testimony. After some 70 years of being guided by the general acceptance standard announced in *Frye v. United States*,²⁰ the U.S. Supreme Court in *Daubert* expanded the parameters under which expert testimony would be considered, by accepting the underlying principles announced in the Federal Rules of Evidence; the key principles being, whether the nature of the question being considered is beyond the scope of knowledge we attribute to the fact finder and whether the testimony being offered is capable of assisting the finder of fact. The Court has provided a series of guidelines to federal trial courts based on the nature of the issues presented in the cases that come before them. *Daubert* dealt with evidence generated by epidemiological studies. The nature of these studies and their utility as evidentiary principles came before the Court and required explanation and guidelines for their consideration at trial. The question was, “is this evidence admissible?” In *Joiner*, similar studies were the topic for consideration by the

Court. The issue there was the standard of review of evidentiary decisions. The Court offered guidance by pointing out that the question was not, "can these studies be used to support an expert opinion in general?," but rather, "are they applicable to the case before the court?" If a trial judge finds that the studies are applicable to the case before the court, then the abuse of discretion standard dictates that the decision will not be disturbed on appeal.

The issue of the reliability of expert opinion based on experience in the field had not come before the Court. The principles announced in *Daubert* and *Joiner* however provided a map for anyone seeking to admit such expert opinions into evidence. The *Daubert* decision noted that to form the basis for expert testimony, facts relied upon by the expert must, in accordance with Rule 703, be of a "type relied upon by experts in the particular field in forming opinions or inferences upon the subject." In the *Kumho* case, the expert utilized a methodology familiar to the particular field, but no evidence was offered to show that he utilized this methodology in a manner consistent with the accepted principles in his field. The Court's review of the record further indicates a series of internal inconsistencies in the expert's use of the data collected and the methodology as applied in this case.

As the Court did in the *Joiner* decision, the Court in *Kumho* analyzed the action taken by the district court to provide an outline for the type of analysis trial judges in federal courts should consider when confronted with unusual or complex presentations by expert witnesses. The Court

went to great lengths to point out that the type of testimony being proffered was not the problem, but rather it was the manner of presentation that led to the evidence being ruled inadmissible. The message of the *Kumho* decision is that expert testimony from fields that can demonstrate their underlying reliability, when used in a fashion that conforms to the standards established by the field in question, will be admissible if it can be related to the facts of the case before the court. The question of whether or not a particular offer of evidence satisfies this test may be resolved by applying such tests as the trial court deems appropriate to satisfy its concerns for reliability of evidence. When read with the *Joiner* decision, it is important to remember that the decision by the trial court will only be subject to review under the abuse of discretion standard.

Mental health practitioners called as experts should keep in mind that, to be admissible, their opinions should be based on data observed and gathered in the case at hand. They should take care to separate raw data from the inferences that can be drawn from the observations. They should consider the methodology they apply to their consideration of the data and be prepared to support the choice of methodology. They should be familiar with the empirical evidence that supports any testing or methodology that they rely upon. They should be prepared to support the efficacy of using that methodology in the consideration of the set of factors present in this particular case. By relying on the tools of good clinical observation and assessment and by understanding the proper foundation for the utilization of a

particular study to support their interpretation of this data, mental health professionals can feel confident that their opinions, when properly presented, will come before the court when they are called upon to testify. By working with the attorney seeking to introduce the evidence under consideration, experts can come to the court prepared to demonstrate that the reliability of their opinions is something "better than chance" and that they in fact have information to assist the finder of fact.

References

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