Procedural ruling sets higher bar for expert-witness testimony

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In a procedural decision that could keep so-called junk science out of the courtroom, the District of Columbia Court of Appeals adopted an evidentiary standard that places additional scrutiny on testimony from expert witnesses.

The case at the center of the ruling—*Motorola v. Murray*—raises the issue of whether cellphones cause brain cancer. In total, 29 cases on the subject matter were brought before the Superior Court for the District of Columbia.

The court did acknowledge isolated strands of scientific data that suggest a possible causal connection between cellphone use and brain cancer. But the court ultimately ruled that based on the research to date, there was inadequate data for any scientist to opine on a causal connection between cellphone use and cancer to any degree of scientific certainty.

In spite of this, the plaintiffs offered their own expert testimony to the contrary, arguing that the jury should determine the validity of the testimony.

The importance of expert testimony

The AMA, with an interest in deterring abusive lawsuits, voiced agreement with the defendants through an amicus brief that was submitted by the Litigation Center, through the AMA and the Medical Society of the District of Columbia. In its brief, the AMA cited a prior court ruling—*Girardot v. United States*—that maintained that “in the past three decades, the use of expert witnesses has skyrocketed” causing “some commentators [to] claim that the American judicial hearing is becoming trial by expert.”

The brief adds that “purported expert testimony often is the necessary linchpin for tort claims seeking sizable monetary damages.”

The Superior Court for the District of Columbia had been operating under a precedent set in *Frye v. United States*

, a case tried in 1923. Under the Frye standard, testimony would be admissible if the expert employed a method that would be deemed acceptable in the relevant scientific community and the expert would not unduly prejudice the jury.

The defendants objected, stating that the testimony was invalid under more modern court standards adopted elsewhere.

The standards the defendants cited were Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.* Under the latter decision, the court is to allow reasonably reliable expert testimony. The petitioners contended the plaintiffs' expert testimony should be excluded due to a lack of necessary scientific data.

The courts as gatekeepers

The AMA's brief highlights the importance of the court's function as a safeguard against unreliable information. According to the brief, the courts:

- Are required to assess the admissibility of evidence, even where such assessment turns on questions of fact.
- Must be particularly wary of evidence that is not based upon firsthand knowledge because such evidence lacks a basic safeguard of reliability.
- Should apply additional reliability screens on certain types of evidence that may have an especially powerful impact on a jury.

The D.C. appeals court agreed, citing that there should be predictable guidance as to what kind of expert testimony could be admitted, in a ruling in late 2016. With that, the appellate court remanded the case to apply the stricter expert standard to the specific witnesses and facts of this case. Since the decision was handed down in October, the plaintiffs have been compiling new expert reports that will be scrutinized by the court and the defense under the newly adopted evidentiary standard.

AMA policy on medical witness testimony states that courts "should admit into evidence only expert medical testimony that is shown through a proper legal foundation to be based on (a) widely accepted theories of medical science or (b) theories that are supported by a respectable minority of experts in the field at issue."

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