



1993

Recent Developments: Daubert v. Merrell Dow Pharmaceuticals, Inc.: Reliability of Testimony Rather Than General Acceptance Provides the Standard for the Admissibility of Scientific Evidence in Federal Trials

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Recommended Citation

Pike, Sandra G. (1993) "Recent Developments: Daubert v. Merrell Dow Pharmaceuticals, Inc.: Reliability of Testimony Rather Than General Acceptance Provides the Standard for the Admissibility of Scientific Evidence in Federal Trials," *University of Baltimore Law Forum*: Vol. 24 : No. 1 , Article 12.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol24/iss1/12>

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Helling v. McKinney

*VALID EIGHTH AMENDMENT
CLAIM STATED WHERE
PRISONER ALLEGED COM-
PELLED EXPOSURE TO
DANGEROUS LEVELS OF
SECONDARY SMOKE
CREATED AN
UNREASONABLE RISK OF
HARM TO HIS FUTURE
HEALTH.*

In a 7-2 decision, the United States Supreme Court in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), held that a Nevada state prisoner stated an actionable Eighth Amendment claim of cruel and unusual punishment, wherein he contended that prison officials involuntarily exposed him to Environmental Tobacco Smoke ("ETS") levels, endangering his future health. In so holding, Justice Byron R. White, writing for the majority, opined that an inmate is entitled to injunctive relief when he establishes that he is subjected to unsafe or inhumane conditions, which are threatening to his health and adverse to contemporary standards of decency, as a result of the deliberate indifference of prison officials.

While completing his term of imprisonment in the Nevada State Prison, Carson City, Nevada, William McKinney was confined in a cell with a fellow prisoner who smoked approximately five packs of cigarettes per day. McKinney claimed that he suffered from deteriorating health due to inhalation of secondary smoke, and that his health was further jeopardized by continued confinement with a heavy smoker. McKinney further contended that no warnings were given to inmates upon the sale and distribution of cigarettes concerning the potential health risks posed by ETS, and at that time, the director of the Nevada state prison system had not yet adopted a policy prohibiting smoking in restricted areas. Although McKinney had been transferred to Ely State Prison, where he was no longer housed with a five-pack-a-day smoker, he still faced the possibility of being returned to Carson City.

On December 18, 1986, McKinney filed a *pro se* civil rights suit in the United States District Court, seeking injunctive relief and damages for violations of his Eighth Amendment rights. McKinney named as defendants the director of the prison, the

warden, the associate warden, a unit counselor and the manager of the prison store. He alleged that he was subjected to cruel and unusual punishment as a result of the health threat created by ETS. At the jury trial, a federal magistrate granted the prison officials' motion for a directed verdict on the grounds that McKinney did not have a constitutional right to be incarcerated in a smoke-free environment, and that McKinney failed to produce evidence demonstrating the deliberate indifference of the prison officials to his immediate health needs.

The Court of Appeals for the Ninth Circuit affirmed the lower court's findings that McKinney was not constitutionally entitled to confinement in an environment free of ETS and that no evidence existed in the record indicating the deliberate indifference of prison officials to any medical problems McKinney may have suffered. The court further granted the prison officials immunity from liability damages, because a law providing for such damages was not in existence in Nevada. The court, however, held that McKinney had stated a valid Eighth Amendment claim by alleging future harm to his health as a result of compelled exposure to dangerous levels of ETS.

The United States Supreme Court vacated the judgment of the court of appeals in light of its recent decision in *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321 (1991). The Court held that *Seiter* added a subjective element to Eighth Amendment claims, where the deliberate indifference of the prison officials is taken into consideration, and therefore remanded the case to the court of appeals for further proceedings consistent with its opinion. Upon remand and in accord with the higher court's order, the court of appeals reinstated its prior judgment and remanded the case to the trial court for findings pursuant to its opinion and *Seiter*. The United

States Supreme Court granted the prison officials' petition for certiorari and affirmed the judgment of the court of appeals.

The Court began its analysis by addressing the issues brought by the prison officials in their petition for certiorari: (1) that in his complaint, McKinney only alleged that he suffered from present maladies as a result of ETS exposure and not future health problems, and that the lower court erred in deciding it sua sponte; and (2) that the court of appeals erred in finding that McKinney had stated a valid Eighth Amendment cause of action, wherein he claimed ETS exposure threatened his future health. *Helling*, 113 S.Ct. at 2479. The Court disposed of the first issue by deferring to the court of appeals' reading of the record upon intermediate appellate review, and then focussed its analysis upon the second issue. *Id.* The Court found that the court of appeals did not err in finding that McKinney stated an Eighth Amendment claim upon which relief could be granted.

The Court then proceeded to interpret the Eighth Amendment and what constitutes a violation thereof. The Court stated:

...When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment...

Id. at 2480 (quoting *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989)). By failing to provide for "basic human needs," such action invariably violates contemporary standards of decency. *Id.* at 2480 (citing *Estelle v. Gamble*, 429 U.S. 97, 103-

04 (1976)). The Court stressed, however, that negligent deprivation of medical assistance to inmates does not rise to the level of an Eighth Amendment violation. *Id.* at 2480. In order to amount to an Eighth Amendment violation, prison officials must act with "deliberate indifference to serious medical needs of prisoners." *Id.* at 2480 (quoting *Estelle*, 429 U.S. at 104). *Seiter* clarified the deliberate indifference standard by adding a subjective component into the Eighth Amendment inquiry, and thereby mandating an exploration into the mind set of prison officials.

The Court rejected the prison officials' claim that an Eighth Amendment violation is based solely upon the deliberate indifference to present or ongoing health problems suffered by McKinney, which resulted from exposure to toxic levels of ETS. *Id.* at 2480. The Court explicitly stated that the notion "[t]hat the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Id.* The Court cited *Hutto v. Finney*, 437 U.S. 678,682 (1978), in support of its assertion that inmates were entitled to Eighth Amendment injunctive relief when they were overcrowded in cells with others who suffered from contagious diseases. *Id.* In *Hutto*, the conditions of confinement required an Eighth Amendment remedy, even though none of the prisoners had suffered harm, due to the impending nature of the potential injury.

The Court observed that the court of appeals had taken a similar approach to Eighth Amendment issues. For instance, in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) and in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), the court of appeals granted relief under the Eighth Amendment for possible future harm, emphasizing that an inmate need not suffer a tragedy before action will be taken. In *Gates*, inmates were af-

forded relief upon demonstrating unsafe and life-threatening confinement conditions occasioned by exposed electrical wiring, insufficient safeguards against fire, and failure to isolate inmates with infectious disease from the rest of the prison population. In *Ramos*, a prisoner, whose physical safety was endangered by threats of assault, was awarded Eighth Amendment relief prior to any physical injury.

The Court further rejected the argument of the United States in its *amicus curiae* brief, wherein it supported the position of the prison officials. While the Government conceded that certain conditions of confinement that "present a risk of sufficient magnitude" to future health may constitute an Eighth Amendment violation, it contended, however, that the effects of exposure to secondary smoke on an individual is tenuous and that such exposure does not deviate from any societal standard of decency. *Id.* at 2481. The Court refused to reverse the court of appeals on these grounds alone, stating that such a reversal would be "premature." *Id.*

In affirming the intermediate appellate court, the Supreme Court enumerated the necessary objective and subjective elements of a valid Eighth Amendment claim for cruel and unusual punishment. *Id.* To satisfy the objective prong, McKinney must establish, through the use of scientific and statistical evidence, that he was subjected to unreasonably dangerous levels of ETS. *Id.* at 2482. The Court pointed out that the district court should consider the fact that McKinney was transferred to another prison, that he was no longer housed in a cell with a heavy smoker, and that the director of the Nevada state prison system has adopted a smoking policy throughout the prison system. *Id.* Furthermore, the objective factor requires the court to assess, whether or not society considers such a health risk,

as contrary to current standards of decency. *Id.*

With respect to the subjective element, the deliberate indifference standard, McKinney must affirmatively prove that prison officials ignored the potential health risks of secondary smoke. *Id.* The Court stated that the district court should consider the current attitudes and conduct of prison officials in order to evaluate their mind set when administering prison policies. *Id.* The Court pointed out that the district court should consider arguments concerning the realities of prison administration, as well as evaluate any new administrative policies adopted by the prison system. *Id.* The Court noted that this factor would

probably be mitigated in light of the new smoking policy instituted by the state prison system. *Id.*

In his dissenting opinion, Justice Thomas, with whom Justice Scalia joined, disagreed with the majority's interpretation of the Eighth Amendment, whereby "it applies to a prisoner's mere *risk* of injury." *Id.* (Thomas, J., dissenting). Through a textual and historical approach, Justice Thomas failed to find any support for the majority's position "that deprivations suffered by a prisoner constitute 'punishment[t]' for Eighth Amendment purposes, even when deprivations have not been inflicted as part of a criminal sentence." *Id.* at 2483.

The *Helling* opinion is significant in that prisoners may be afforded injunctive relief for unsafe conditions of confinement prior to suffering any injury. The Court, however, cautioned that such claims must meet both the subjective element of deliberate indifference and the objective component of hazardous conditions which society deems intolerable. This is an expansive decision which widens the penumbra of prisoners' rights. Prisoners are now empowered with the means by which they may combat an indifferent prison administration, and obtain relief from inhumane treatment and living conditions without needless suffering.

-Amy Conrad

Daubert v. Merrell Dow Pharmaceuticals, Inc.

RELIABILITY OF TESTIMONY RATHER THAN GENERAL ACCEPTANCE PROVIDES THE STANDARD FOR THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE IN FEDERAL TRIALS.

For seventy years, the dominant standard for determining the admissibility of novel scientific evidence in federal trials has been the "general acceptance" test established in *Frye v. United States*, 293 F. 1013 (1923). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the United States Supreme Court unanimously held that the Federal Rules of Evidence, not the "general acceptance" test, govern a trial judge's determination of whether or not to admit scientific testimony into evidence. In so ruling, the Court gave federal judges wider latitude to determine what scientific data should be admissible at trial.

Jason Daubert and Eric Schuller were born with serious birth defects. The minor boys and their parents brought an action in California state court alleging that the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by Merrell Dow Pharmaceuticals, Inc. caused the children's birth defects. Merrell

Dow removed the case to federal court on diversity grounds. The United States District Court for the Southern District of California granted summary judgment to Merrell Dow based upon the affidavit of one reputable expert. In the affidavit, the expert concluded that maternal use of Bendectin had not been shown in any published journals to be a risk factor for causing human birth defects. *Daubert*, 113 S. Ct. at 2791.

Applying the *Frye* test, the district court concluded that contrary evidence presented by the plaintiffs was inadmissible. Despite the proffered testimony of eight well-credentialed experts that Bendectin can cause birth defects, the trial court found that such evidence was not "sufficiently established to have general acceptance in the field in which it belongs." *Daubert*, at 2793 (quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)). Citing *Frye* for the rule that expert opinion of scientific data is inadmissible unless