

[Third Circuit Upholds Exclusion of Plaintiff's Causation Expert](#)

June 8, 2011 by [Sean Wajert](#)

The Third Circuit last week affirmed the exclusion of expert testimony in a toxic tort suit in which plaintiff alleged defendants' insecticide products gave him non-Hodgkin's lymphoma. [Pritchard v. Dow AgroSciences](#), et al., No.10-2168 (3d Cir. 2011).

Plaintiff claimed that he contracted cancer from a pesticide produced by defendant Dow AgroSciences. His wife claimed to have suffered derivative injuries. In support of their complaint, the Pritchards solicited the expert testimony of Dr. Bennet I. Omalu, who provided the District Court with a report and, later, a declaration, stating that Dursban caused the cancer. Although the trial court found Dr. Omalu to be a qualified expert, it ruled (on Dow's motion) that his proposed testimony was unreliable and therefore inadmissible at trial under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The exclusion of Dr. Omalu's testimony doomed the lawsuit, because plaintiffs had no other evidence of causation. Plaintiffs appealed.

The appeal tried to raise the issues surrounding the intersection of federal law, rules of evidence underlying *Daubert*, and state law, which supplies the elements of a claim (including causation) in a diversity case. Plaintiffs argued that in the course of finding that Dr. Omalu's testimony was unreliable, the District Court erroneously relied on principles that were supposedly at odds with state (Pennsylvania) substantive law governing the level of certainty required to establish causation, having to do with idiopathic disease and epidemiological studies.

It is true that the trial court noted that Dr. Omalu did not rule out unknown or idiopathic causes; that the court considered the fact that the epidemiological study on which the doctor wished to rely showed only a relative risk of 2.0; and that the court observed that the proposed testimony was not grounded in science as Dr. Omalu has not presented any statistically significant evidence showing an association between the chemical agent at issue and non-Hodgkins lymphoma. See *Pritchard v. Dow Agro Sciences*, 705 F. Supp. 2d 471, 492, 486, 493 (W.D. Pa. 2010).

However, the trial court considered these factors among "a host of other deficiencies," as components of a determination that the proffered testimony failed to satisfy the admissibility standard. The trial court did not adopt any bright-line rules, but instead evaluated the plaintiffs' proffer using a flexible approach as directed by the Court of Appeals in *Heller v. Shaw Industries*, 167 F.3d 146 (3d Cir. 1999). This was an evidentiary ruling, separate and distinct from any substantive question regarding causation (which the court never had reason to reach).

Plaintiffs also argued that the court had engaged in some kind of improper balancing of plaintiffs' scientific evidence vs. defendants'. But the district court engaged in no such balancing. Instead, it rightly concluded that Dr. Omalu's proposed testimony was unreliable

due to numerous cracks in its scientific foundation. He cited only one specific study in support of his general causation conclusion that Dursban causes cancer — and in fact, he relied not on the study itself but on his own reinterpretation of the study's findings using a lower confidence interval. (That is, he recalculated the study's conclusions so as to serve plaintiff's litigation needs, said the court.) Moreover, the plaintiffs offered no clear explanation of the methods through which he recalculated the study's results, leaving the court unable to evaluate the reliability of his methodology.

And the expert's specific causation conclusion that Dursban had caused Mr. Pritchard's illness was not supported by evidence in the medical records, discovery responses, deposition testimony, application records, or any other information regarding Mr. Pritchard's exposure to pesticides. Significantly, Dr. Omalu also failed to adequately address possible alternative causes of the cancer.

Accordingly, the trial committed no error in excluding the expert testimony, and in the absence of proof of causation, the case was properly dismissed. Affirmed.