

How NJ Talc Case May Shift NY Courts On Expert Testimony

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In its recent decision allowing and precluding expert testimony about alleged asbestos contamination of Johnson & Johnson LLP's talc products, the U.S. District Court for the District of New Jersey assessed the admissibility of expert testimony under the Daubert evidentiary standard, which differs from the standard applied by New Jersey state courts.

This decision may influence New York state courts — which, like those in New Jersey, are among the minority of jurisdictions that still follow the Frye evidentiary standard.[1] A shift toward the more widely accepted Daubert standard would require New York trial courts to assume a more active gatekeeping role regarding expert testimony — a move that could make or break mass tort cases that depend on expert testimony.

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, the U.S. Supreme Court ruled that Federal Rule of Evidence 702 superseded the standard in *Frye v. U.S.* for admitting expert testimony.[2] But three decades after *Daubert*, a few state courts have adhered to *Frye* and resisted adopting the *Daubert* standard.

Although New York remains among the minority of *Frye* states, it has gradually adopted elements of *Daubert*, and the *Johnson & Johnson* decision may push New York state courts even further towards *Daubert*.

The *Frye* test for admissibility of expert testimony is whether the expert's scientific technique is generally accepted by the scientific community.[3] The *Daubert* standard involves a more complex, multistep analysis of the expert's methods in which the trial court, rather than the scientific community, acts as gatekeeper.[4]

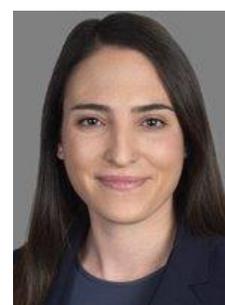
The Supreme Court in *Daubert* held that trial judges must not only consider the general acceptance of expert testimony, but must also ensure that the testimony has a reliable foundation and is relevant. To that end, the *Daubert* court enumerated four nonexhaustive factors for trial courts to consider when reviewing the science underlying an expert opinion:



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- Whether it is generally accepted by the scientific community;
- Whether the methodology is published and subject to peer review;
- Whether the methodology has a known or potential rate of error; and
- Whether the results are testable.[5]

U.S. District Judge Freda L. Wolfson's Johnson & Johnson ruling under Daubert outlines the involved role of trial courts in assessing the admissibility of expert testimony.[6] The decision underscores the Daubert factors described above.[7]

Judge Wolfson's decision allows plaintiffs to present expert opinion that Johnson & Johnson's talc products contained asbestos, and that use of those products can cause ovarian cancer. But the decision also limits testimony from the plaintiffs' experts based on unreliable methodology.

Specifically, Judge Wolfson permitted testimony from the plaintiffs' expert microscopist that asbestos was found in Johnson & Johnson talc samples using transmission electron microscopy. But she limited him from testifying about his polarized light microscopy analysis, because he did not disclose some testing information in his report. Judge Wolfson ruled that without this information, it would be too difficult to replicate the expert's testing, and therefore the evidence was unreliable.

The New York Court of Appeals has reaffirmed Frye several times since Daubert was decided in 1993.[8] But in 2006, the Court of Appeals departed slightly from Frye in *Parker v. Mobil Oil Corp.*, holding that trial courts must assess whether there is proper foundation for expert testimony.

The Parker court notably cited to federal cases applying Daubert factors, stating that "they are instructive to the extent that they address the reliability of the expert's methodology." [9] The result was a broader standard in New York, designed to strike a balance in toxic tort cases between the dangers of presenting unreliable science to the jury and of demanding insurmountable evidentiary standards from plaintiffs injured by toxic substances with long latency periods.[10]

Since Parker, New York courts have continued to look to Daubert to assess the admissibility of expert opinion. In 2009, for example, in *In re: Neurontin Product Liability Litigation*, a New York trial court acknowledged that although New York traditionally adheres to the Frye standard, "a Daubert-type analysis" is relevant to determine whether the expert's methodology leads to a reliable causation theory or opinion.[11]

The First Department addressed the issue in 2017, with its split decision in *In re: New York City Asbestos Litigation*. The majority vacated a jury verdict in the plaintiff's favor, because there was insufficient scientific evidence that the defendant's asbestos-containing product was the specific cause of the plaintiff's injury, as required by Parker.

In a separate concurring opinion, Justice Marcy L. Kahn of the Appellate Division discussed the standard outlined in Parker in the context of Daubert. In doing so, Justice Kahn advised that New York courts should look to Daubert to avoid speculation by experts and generalized conclusions that might otherwise be admitted under Frye.[12]

The First Department addressed the issue again in an April case involving claimed asbestos exposure from cosmetic talc products. The Appellate Division in *Nemeth v. Brenntag North America* decided the admissibility question under a Parker-type analysis, acknowledging that even when an expert presents an opinion using reliable principles and methods, a court may still reject it if there is an analytical gap

between the data and the expert's opinion.[13]

As New York state courts tackle an increasing caseload of talc cases, the Johnson & Johnson decision may further influence the courts to adopt Daubert factors for admitting expert opinions. A more Daubert-influenced standard would force plaintiffs experts to more thoroughly establish that their methods and conclusions are sound, and require courts to act as diligent gatekeepers when reviewing expert testimony.

Because talc cases often hinge on complex scientific evidence, a continued evolution of the evidentiary standard may significantly affect this growing area of litigation in New York.

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[1] In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Litigation (MDL No. 2738).

[2] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993); Federal Rules of Evidence Rule 702, 28 U.S.C.A.

[3] Frye v. U.S., 293 F. 1013, 34 A.L.R. 145 (App. D.C. 1923); Harold L. Schwab, Is It Junk or Genuine?, 76 Dec. N.Y. St. B.J. 10 (Nov./Dec. 2004).

[4] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

[5] Id.

[6] Wolfson Opinion at p. 6.

[7] Wolfson Opinion at p. 8.

[8] People v. Wesley, 83 N.Y.2d 417 (1994); People v. Wernick, 89 N.Y.2d 111 (1996); see also Heckstall v. Pincus, 797 N.Y.S.2d 445 (1st Dept. 2005).

[9] Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 448 fn.4 (2006).

[10] Id. at 448.

[11] In re: Neurontin Product Liability Litig., 24 Misc.3d 1215(A), 897 N.Y.S.2d 671 (Sup. Ct. New York County May 15, 2009).

[12] In re: New York City Asbestos Litigation, 148 A.D.3d 233 (1st Dep't 2017) (Kahn, J., concurring).

[13] Nemeth v. Brenntag North America, 2020 WL 1705445 at 6 (April 9, 2020).