ALM | LAW.COM

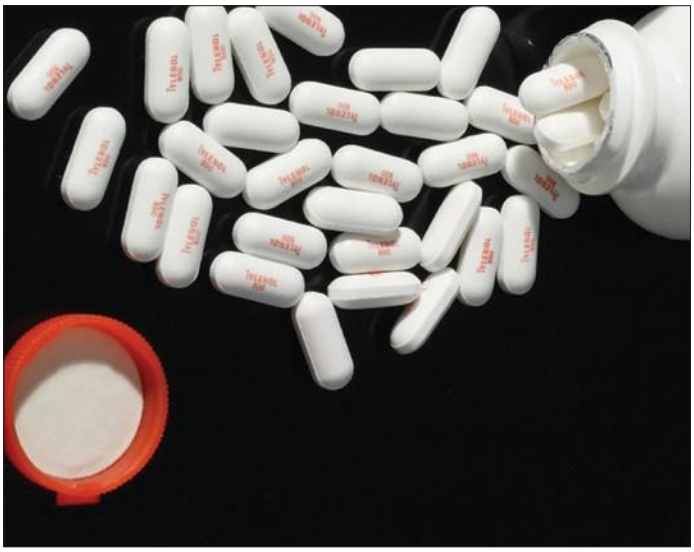
New York Law Journal

Understanding Rule 702 and the 'Daubert' Standard; Related Updates in the Tylenol and Paraquat MDLs

By Edward E. Neiger, Alexandra Robertson and Gregory Lawrence

March 08, 2024

For multidistrict litigation (MDL) to move forward to trials, we must understand *Daubert,* Rule 702 and the role of the judge in determining the admissibility of expert testimony. The use of expert testimony in the litigation process has been going on for centuries. Acknowledging the need for a check against the admission of unqualified experts and "junk science," between 1923 and 1993, state and federal courts primarily followed the standard laid out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under Frye's general acceptance test, expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community. The court must determine whether the method by which the evidence was obtained was generally accepted by experts in the particular field in which it belongs.



In 1993, the Supreme Court abolished the *Frye* standard on a federal level in its opinion in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, the court held that the Federal Rules of Evidence, specifically Rule 702, superseded *Frye* as the standard for admissibility of expert evidence in federal courts. Rule 702, "Testimony by Expert Witnesses," has been modified several times over the years, with its current language as follows:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

Under the holdings of *Daubert*, the trial judge acts as a gatekeeper against the admission of unreliable expert testimony. As a way for judges to assess the reliability of expert testimony, the *Daubert* court laid out a non-exclusive list of factors for the court to consider: (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Since the time of the publication of the *Daubert* opinion, most states have adopted some form of the *Daubert* standard. That said, state level adoption of *Daubert* has not been universal; however, all federal courts follow *Daubert*.

Updates in Tylenol and Paraquat MDLs

There has been a very consequential development in the Tylenol litigation, *In Re: Acetaminophen – ASD-ADHD Products Liability Litigation*, MDL No. 3043. Plaintiffs in the MDL assert that their children developed autism spectrum disorder (ASD), attention-deficit/hyperactivity disorder (ADHD) or both as a result of in-utero Tylenol/acetaminophen exposure. Plaintiffs also contend that manufacturers and distributors failed to warn consumers of the increased risk of ASD and ADHD.

On Dec. 7, 2023, the judge presiding over the MDL, Judge Denise Cote of the Southern District of New York held a hearing on the admissibility of various scientific experts pursuant to Rul 702 of the Federal Rules of Evidence.

On Dec. 18, 2023, just 11 calendar days later, Cote entered a 148-page order rejecting all five of the plaintiffs' causation experts, in effect decimating plaintiffs' case. In her order on *Daubert,* she found that the plaintiffs' expert witnesses had not offered sound scientific methodology that supports the opinion that Tylenol/acetaminophen's active ingredient can cause ASD or ADHD. She believed there to be lack of scientific consensus on the connec- tion between in-utero exposure and neurodevelopmental disorders. Cote determined that plaintiffs' expert witnesses did not meet the *Daubert* criteria for admissibility in federal court, subjecting the cases to dismissal.

On Jan. 16, 2024, Cote entered an Order to Show Cause, ordering the plaintiffs to

show cause as to why final judgment under Rule 56 should not be entered in each MDL case on the ground that plaintiffs had failed to offer admissible evidence that prenatal exposure to acetaminophen causes either ASD or ADHD in their children. Cote followed that order up on Feb. 21, 2024, with a final judgment order granting summary judgment in favor of defendants. The plaintiffs' lead- ership has stated their intention to appeal Cote's Rule 702 order.

Meanwhile, in another MDL, *In re: Paraquat Products Liability Litigation,* MDL No. 3004, Judge Nancy Rosenstengel, Chief Judge for the Southern District of Illinois, presided over hearings dealing with the admissibility of the parties' expert witnesses over the course of several days beginning Aug. 21, 2023. To date, Rosenstengel has not entered any *Daubert-related orders, which would allow or deny any of the proposed experts. The first set of trials, originally scheduled to begin in fall 2023, have been put on hold and as of now no new trial dates have been set.*

Rosenstengel has on more than one occasion raised concerns about the potential number of cases on the docket that present "implausible or far-fetched theories of liability," and recently ordered that additional limited discovery be conducted on a small number of MDL cases, including the taking of plaintiffs' deposition.

Additionally, on Feb. 26, 2024, Rosenstengel entered an order directing each MDL plaintiff to serve third-party subpoenas pursuant to Federal Rule of Civil Procedure 45 seeking documentary evidence providing proof of use and/or exposure to Paraquat no later than March 11, 2024.

While speculative, Rosenstengel's continued efforts in the litigation, as well as her recent court orders requiring additional discovery, are positive signs as to her ruling favorably on Daubert and the admissibility of the parties' expert witnesses.

Edward E. Neiger *is co-managing partner at ASK LLP, a national law firm focusing on bankruptcy law.* **Alexandra Robertson** *is a partner and* **Gregory Lawrence** *is an associate at the firm.*