



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 15 | Number 2

Article 17

---

1999

## **The Use of Expert Proofs in Complex Product Liability Litigation in New York: A Preliminary Consideration of Varying Federal and New York State Approaches to Disclosure and Admissibility**

Steven J. Phillips

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Litigation Commons](#)

---

### **Recommended Citation**

Phillips, Steven J. (1999) "The Use of Expert Proofs in Complex Product Liability Litigation in New York: A Preliminary Consideration of Varying Federal and New York State Approaches to Disclosure and Admissibility," *Touro Law Review*. Vol. 15: No. 2, Article 17.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol15/iss2/17>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# THE USE OF EXPERT PROOFS IN COMPLEX PRODUCT LIABILITY LITIGATION IN NEW YORK: A PRELIMINARY CONSIDERATION OF VARYING FEDERAL AND NEW YORK STATE APPROACHES TO DISCLOSURE AND ADMISSIBILITY

*Steven J. Phillips\**

## INTRODUCTION

Since at least the beginning of this century, scientific and expert evidence has presented vexing difficulties for the law.<sup>1</sup> These difficulties, in no small measure, derive from fundamental distinctions between legal, scientific, medical, and regulatory processes, as well as from the cultures that support and inform each of these activities.<sup>2</sup>

The legal system, employing an adversarial process to arrive at "truth," is a normative process, which has as its goals the prompt, cost effective, authoritative and final, as well as the just resolutions of disputes.<sup>3</sup> By contrast, science is an activity that employs empirical analyses to discover "truth" as found in

---

\* Steven J. Phillips obtained a B.A. from Williams College before obtaining his J.D. at Columbia Law School. He is a member and the founding partner of the firm Levy Phillips & Konigsberg. At Levy Phillips & Konigsberg, he is trial and appellate counsel in mass tort litigation concerning personal injury, wrongful death, property damage and economic loss resulting from occupational and environmental exposures to toxic and other harmful substances. He has participated in many notable civil trials and appellate cases. He has also published works such as *NO HEROES NO VILLAINS: THE STORY of a MURDER TRIAL, RESISTING ARREST, AND CIVIL ACTIONS*. The author would like to acknowledge the assistance of Sheri E. Kanner, a law student at New York University Law School.

<sup>1</sup> See, e.g., Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

<sup>2</sup> Peter H. Shuck, *Multi-Culturalism Redux: Science, Law, and Politics*, 11 YALE L. & POL'Y REV. 1 (1993).

<sup>3</sup> *Id.* at 15.

verifiable phenomena.<sup>4</sup> In this sense, science is an open-ended descriptive process which cannot concern itself with how things should be, but rather, with how they actually are. Accordingly, concerns about justice or injustice are alien to the notion of scientific inquiry.<sup>5</sup>

The practice of medicine, while plainly informed by scientific considerations, differs from science with respect to the problem of timing. In science, all answers are by their nature tentative and subject to further and future refinement. Practicing physicians, on the other hand, confronted with actual patients and medical emergencies have no such luxury.<sup>6</sup> Differential diagnoses must be achieved and action must be taken based upon highly imperfect information and in an interactive manner. Indeed, physicians' interventions themselves are constantly changing to what is "true" concerning a patient's condition.<sup>7</sup>

Then again, in a regulatory or executive capacity, government officials are faced with yet another set of problems in their fact-finding and decision making processes.<sup>8</sup> These officials, charged with responsibility to protect public welfare, and presented with potential crises [e.g., a suspect product (breast implants) or a possible environmental disaster (Three Mile Island)], must act within tight time parameters, and must take into account considerations of political and social acceptability in arriving at their judgments and policies.<sup>9</sup> Once again, "truth" as viewed through this prism may look very different from the respective "truths" of the scientist, jurist or the physician.

Finally, it must be recognized that there exists a host of other professions or technological disciplines such as psychology, engineering, human factors, industrial hygiene, and toxicology,

---

<sup>4</sup> WEBSTER'S COLLEGIATE DICTIONARY 1051 (9th ed. 1989).

<sup>5</sup> See Shuck, *supra* note 2, at 1-5.

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 29.

<sup>9</sup> See ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND LAW IN THE BREAST IMPLANT CASE, W.W. NORTON (1997). See also Erikson, *Toxic Reckoning: Business Faces a New Kind of Fear*, HARV. BUS. REV. 118 (1990).

all of which possess their own distinct methodologies and rationales, and some of which may legitimately approach comparable questions from different perspectives.

Against this broad background, in the recent past, our courts have repeatedly been called upon in product liability mass tort litigation to grapple with, and resolve, questions concerning the admissibility and legal sufficiency of expert proofs bearing upon questions of proximate causation, and in some instances, fault. The United States Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*,<sup>10</sup> has focused both the scholarly and legal practice communities upon these concerns. However, far from settling the manner in which these issues should be resolved, *Daubert* and its progeny have, if anything, prompted even greater debate and uncertainty. Indeed, it is not surprising that on two occasions since the *Daubert* decision, the Supreme Court has itself seen fit to return to aspects of this general question.<sup>11</sup>

Strictly speaking, *Daubert* concerns itself with the admissibility of purportedly novel scientific proofs in areas which, depending upon a litigator's perspective, might be characterized as other "junk science" or as cutting edge technology in a fast changing scientific world.<sup>12</sup> However, as the Supreme Court and other tribunals have increasingly turned to address the expert proof issue, and as the stakes have gone up, particularly in a mass tort context, so-called *Daubert* issues have been raised in an ever expanding number of contexts. Thus, while in earlier times, reported decisions concerning novel scientific techniques were largely limited to the domain of the criminal law, today a dizzying number of such disputes are routinely raised in a wide array of civil litigations.

In all events, a full appreciation of the role of expert proof in mass tort personal injury litigation cannot be gleaned purely from

---

<sup>10</sup> 509 U.S. 579 (1993).

<sup>11</sup> See *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); see also *Carmichael v. Sam Yang Tire Co.*, 131 F.3d 1433 (11th Cir.), cert. granted sub nom. *Kumho Tire Co., Ltd. v. Carmichael*, 118 S. Ct. 2339 (1998).

<sup>12</sup> See *Daubert*, 509 U.S. at 579.

high court decisions concerning the propriety of particular types of scientific evidence and the formal methodology of determining its admissibility. As a threshold matter, before these standards even came into play, antecedent rules of pretrial disclosure relating to anticipated expert proofs, as well as evidentiary rulings concerning both the type and manner in which foundations must be laid for expert proofs and opinions, play a critical role in the manner in which these issues are framed and resolved.

In addition, a variety of separate practical considerations will often operate at cross-purposes in this area. For instance, concerns about excessive expense and the unfairness of imposing upon poorer litigants the crushing burden of prolonged “expert” discovery, followed by expensive and prolonged pretrial hearings, followed only then by trial, can by themselves render litigation unpalatable even where the science in question is not particularly novel or controversial. Indeed, not only expense, but also questions of delay and docket congestion are also implicated when pretrial “*Daubert*” litigation becomes too commonplace or protracted.

Of course, there is also the fundamental tension between the role of the jury as a fact finder and assessor of credibility, and the gatekeeper function of the trial court in making threshold determinations of relevance and admissibility. Indeed, it is certainly a matter of grave importance that courts not strip from juries their role as fact finders by substituting the courts’ own judgments on the weight and credibility of disputed scientific issues for those of juries under the guise of a *Daubert* determination. Conversely, the fear that profound injuries and the sympathy they engender, coupled with even frivolous science, may move juries to unjust results, fuels the other side of the debate.

In this context, legal practitioners in New York State who litigate products liability, personal injury, wrongful death, and property damage actions, especially in the toxic tort or mass tort area, are often confronted with an interesting dichotomy in prosecuting or defending these actions. Those cases adjudicated in the federal forum proceed subject not only to the *Daubert* decision, but also to the discovery provisions of the Federal Rules

of Civil Procedure, as well as to the codified provisions of the Federal Rules of Evidence. By contrast, in New York State, as is true in a large number of states, the *Daubert* holding has been expressly rejected in favor of what is commonly known as the *Frye* Rule. This was first enunciated, in 1923, by the United States Court of Appeals for the District of Columbia Circuit in *Frye v. United States*.<sup>13</sup> In addition, expert disclosure under the New York Civil Practice Laws and Rules, as well as the case law authority regarding New York's largely uncodified rules of evidence, are in many respects quite different from those existing in the Federal system.

Moreover, although there are important similarities between New York State and Federal practice vis-a-vis expert proofs in mass tort settings, there are also important substantive and procedural distinctions. The purpose of this presentation is to provide an overview of these similarities and distinctions as a preface toward a later consideration of the relative merits of the approach taken by each forum to these issues.

## I. PRETRIAL DISCLOSURE CONCERNING EXPERT PROOFS

The contrast between the extent of pretrial disclosure concerning anticipated expert testimony permitted in civil litigation in Federal court as opposed to the New York State court systems could not be greater. In the Federal system, wide ranging and frequently redundant expert disclosure is either mandated or broadly tolerated in the interest of permitting parties to prepare fully both for all trial contingencies and for any contemplated motion practice. This frequently occurs in disregard of the expense and delay usually engendered by such rounds of expert discovery. In sharp contrast, New York State practice rather narrowly limits the extent of pretrial expert disclosure, thereby minimizing, to some degree, both the delay and the high transaction costs of the federal approach, albeit at the price of rendering trial preparation less exhaustive.

---

<sup>13</sup> 293 F. 1013 (D.C. Cir. 1923). See also *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

For example, Federal Rule of Civil Procedure 26 now requires a written report, signed by an expert witness, containing

*a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witnesses, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. [emphasis supplied]*<sup>14</sup>

In contrast, New York Civil Practice Laws and Rules Section 3101<sup>15</sup> merely requires a party's attorney to disclose "in reasonable detail" the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion.<sup>16</sup>

In addition, although Federal Rule of Civil Procedure 26(b)(4)(A) now expressly permits parties to depose their adversary's experts, and 26(b)(4)(B) may even permit depositions or interrogatories directed at the opinions or factual knowledge of non-testifying experts, C.P.L.R. 3101(d)(1)(iii) expressly forbids such pretrial disclosure from an adversary's expert without court order "upon a showing of exceptional circumstances," and even then, "subject to restrictions as to scope . . . as the court may deem appropriate . . . ." Accordingly, as existing case law construing the C.P.L.R. has made clear, pretrial expert

---

<sup>14</sup> FED. R. CIV. P. 26 (a)(2)(B).

<sup>15</sup> N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1992).

<sup>16</sup> See, e.g., *Krygier v. Airweld, Inc.*, 176 A.D.2d 700, 574 N.Y.S.2d 790 (2d Dep't 1991) (holding that a party need only supply substance of expert opinions, and is not required to provide the fundamental factual information relied upon).

disclosure beyond that permitted in a conventional C.P.L.R. 3101(d)(1)(i) statement is strongly disfavored and will rarely be permitted.<sup>17</sup>

The only other provisions of New York State law which may directly bear upon the pretrial disclosure of expert materials in civil contexts<sup>18</sup> appear as Rule 202.17 of the Uniform Rules which governs the exchange of medical reports in personal injury and wrongful death actions.<sup>19</sup> Subdivision (b)(1) of this rule had historically required a "detailed recital of injuries and conditions as to which testimony will be offered at trial . . ." <sup>20</sup> However, the newly amended rule, which went into effect on May 12, 1998, expanded its applicability from the reports of physicians to that of all medical providers, and additionally deleted the term "detailed" from the necessary recital. The purpose for this deletion, as reflected in the recommendations of the Advisory Committee to the Chief Administrator, was to spare plaintiffs the escalating costs of obtaining medical reports from treating physicians, reasoning that normal medical records and administrative reports, such as no fault forms or Workers' Compensation documents, would adequately identify the medical conditions and diagnoses for which treating physicians had rendered care, and, accordingly, about which they might give testimony.<sup>21</sup> Once again, the philosophy in New York State practice has remained consistent as one of minimizing expenses and avoiding the delays occasioned by the need to obtain written and signed reports even where the amount of information thereby made discoverable is diminished.<sup>22</sup>

---

<sup>17</sup> See, e.g., *Venice v. Honeywell, Inc.*, 194 A.D.2d 442, 599 N.Y.S.2d 254 (1st Dep't 1993).

<sup>18</sup> Specialized provisions concerning court-appointed experts in the context of matrimonial and child custody cases are codified in Section 202.18 of the Uniform Rules for the Supreme Court and the County Court and are not relevant to the instant discussion.

<sup>19</sup> UNIFORM RULES SUP. CT. & COUNTY CT. § 202.17, as amended and reported in N.Y.L.J., May 12, 1998 at 11, 12.

<sup>20</sup> Bert Bauman, Letter to Editor, *Plaintiff's Bar Alerted On Medical Reports*, N.Y.L.J., June 1, 1998, at 2, col.6.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



## II. ADMISSIONS, HEARSAY, AND OUT OF COURT EVIDENCE

To a significant degree, and in two separate regards, rules concerning the admissibility of testimony in the form of admissions, hearsay, or out of court evidence can greatly influence the receipt of expert proof.

The first of these rules concerns statements, whether written or oral, made by defendants regarding scientific and technical matters at issue in a product liability litigation. It is well settled as a legal matter, that large manufacturers of mass produced products can be considered experts with respect not only to the fabrication of these products but also with respect to their potential effects.<sup>23</sup> Moreover, manufacturers are under a common law and/or statutory duty to investigate and research the potential hazards that might be associated with the use or foreseeable misuse of their products.<sup>24</sup> Accordingly, it is commonplace for such parties to have in-house staff trained in such diverse disciplines as Occupational Medicine, Industrial Hygiene, Toxicology, Epidemiology, and Ergonomics. It is equally commonplace for manufacturers acting either alone or through trade associations to fund research and obtain outside consultants to investigate and report back to them regarding potential hazards associated with their products.

Against this background, it is important to recognize that statements made by a party bearing upon a scientific question may be received in evidence as an admission pursuant to either F.R.E. 801(d)(2) or New York State laws, provided that the statement was made by the party in an individual or representative capacity, or by a person authorized by the party to make a statement concerning the subject, or a statement by the

---

<sup>23</sup> See *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990). See also *Cover v. Cohen*, 61 N.Y.2d 261, 274, 461 N.E.2d 864, 811, 473 N.Y.S.2d 378, 385 (1984); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 386, 348 N.E.2d 571, 578, 384 N.Y.S.2d 115, 121 (1976).

<sup>24</sup> See, e.g., *Lancaster Silo & Block v. Northern Propane*, 75 A.D.2d 55, 427 N.Y.S.2d 1009 (4th Dep't 1980).

party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of that relationship.<sup>25</sup> It is important to note that under the Federal Rule, the statement made will be admissible for the truth of the matter stated, and is treated as an admission rather than hearsay, regardless of whether or not the statement was against interest at the time made.<sup>26</sup>

Moreover, under both Federal and State court authorities, statements made by nonparty manufacturers which might otherwise be receivable for notice purposes [and not as hearsay], to establish the state of the art or standards within an industry [what a defendant manufacturer might have learned at a given time through the exercise of due diligence], may also be received in evidence for the truth of the matter, under a hearsay exception, where the statement of the nonparty manufacturer was against interest at the time made.<sup>27</sup> The point here, of course, is that where a corporate defendant is a *bona fide* expert, its genuine admissions, even on potentially controversial scientific issues, will be admissible notwithstanding possible *Daubert* and *Frye* considerations.

The second major area where hearsay considerations become important relate to the bases or foundations for expert testimony. It is no longer true either in Federal or in New York State practice that the bases for an expert's opinion need all be received in evidence as a prerequisite to providing the opinion testimony. Both F.R.E. 705 and C.P.L.R. section 4515 expressly permit experts to state their opinions without first specifying the facts or data on which it is based.<sup>28</sup> Of course, on cross-examination, an

---

<sup>25</sup> See *Lowen v. Great Atlantic & Pacific Tea Co.*, 223 A.D.2d 534, 636 N.Y.S.2d 393 (2d Dep't 1996); See also, *Loschiavo v. Port Authority*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983).

<sup>26</sup> See FED. R. EVID. 804(b)(3).

<sup>27</sup> *Id.* See also *Basile v. Huntington Utilities Fuel Corp.*, 60 A.D.2d 616, 400 N.Y.S.2d 150 (2d Dep't 1977); *In re Tremaine*, 156 A.D.2d 862, 549 N.Y.S.2d 857 (3d Dep't 1989).

<sup>28</sup> See FED. R. EVID. 705. See also N.Y.C.P.L.R. 4515. (McKinney 1992).

expert can be required to specify what those facts or data might be.

Of even greater significance, is that, codified at F.R.E. 703, an expert may rely upon information “‘of a type’ reasonably relied by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”<sup>29</sup>

The New York Court of Appeals, in *People v. Sugden*,<sup>30</sup> has reached a comparable result. Moreover, in the recent case of *People v. Angelo*,<sup>31</sup> the Court of Appeals, while reiterating that the expert witness may rely on “non record evidence only if it is of a kind accepted in the profession as reliable in forming a professional opinion,”<sup>32</sup> carefully stated that this common law rule specifically incorporates the *Frye* requirement, that the non-record evidence be of a type that is generally accepted as a matter of procedure and methodology, as reliable within the scientific community.<sup>33</sup>

Finally, numbers of other hearsay exceptions may also be mentioned in passing as bearing upon expert proof. For instance, F.R.E. 803(18) expressly permits the use of learned treatises when called to the attention of an expert witness either on direct or on cross-examination.<sup>34</sup> The excerpts of these treatises will be received in evidence for the truth of the matter asserted provided that they are simply read to the jury.<sup>35</sup> They may not, however, be received as physical exhibits.<sup>36</sup>

In New York State practice, an expert who acknowledges the authoritativeness of a particular learned writing may likewise read from that text to support his or her opinion, or can have such text

---

<sup>29</sup> See FED. R. EVID. 703.

<sup>30</sup> 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

<sup>31</sup> 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996).

<sup>32</sup> *Id.* at 222, 666 N.E.2d at 1335, 644 N.Y.S.2d at 462.

<sup>33</sup> *Id.* at 223, 666 N.E.2d at 1335, 644 N.Y.S.2d at 462. See also *Hamsch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 469 N.E.2d 516, 480 N.Y.S.2d 195 (1984).

<sup>34</sup> See FED. R. EVID. 803(18).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

read to him or her (provided that the authoritativeness of the text is acknowledged) for impeachment purposes. However, unlike the Federal practice, where assertions of authoritativeness by any expert will be sufficient to bring the text into play as a hearsay exception under F.R.E. 803(18), in State court practice, normally the witness being questioned must acknowledge the authoritativeness of the text. This latter distinction, however, may be more fanciful than real, since once one expert has opened the door by acknowledging a text, thereby getting the information in the text into evidence, other experts will normally be subject to cross-examination concerning that information, as it would already be part of the trial record.

A final source of hearsay evidence which may be of profound importance with respect to scientific disputes are government reports. Findings by the Center for Disease Control, or OSHA, or the National Transportation Safety Board, or the Surgeon General or the FDA may all be enormously relevant to complex product liability cases. F.R.E. 803(8) permits the receipt into evidence of records, reports, statements, or data compilations in any form of public offices or agencies.<sup>37</sup> Similarly, New York State precedents will permit such public records into evidence provided that they possess sufficient independent indicia of reliability.<sup>38</sup>

The various foregoing proofs illustrate graphically that there exist a number of ways in which evidence may be obtained to satisfy a court that a proffer of scientific proof should be received in evidence, thereby buttressing what might otherwise be the mere *ipse dixit* of the proposed expert.

### III. THE *DAUBERT* DECISION

As most practitioners are by now well aware, the United States Supreme Court in *Daubert* overruled the so-called "general

---

<sup>37</sup> See FED. R. EVID. 803(8).

<sup>38</sup> See, e.g., *Cramer v. Kuhn*, 213 A.D.2d 131, 630 N.Y.S.2d 128 (3d Dep't 1985); See also N.Y. C.P.L.R. 4520 (McKinney 1998); N.Y. PUB. HEALTH LAW § 10 (McKinney 1998).

acceptance test” of *Frye v. United States*,<sup>39</sup> and held that in Federal jurisprudence, the enactment of the Federal Rules of Evidence had substituted a new standard in place of the *Frye* test.<sup>40</sup> Article VII of the Federal Rules of Evidence is accordingly now the point of departure for an understanding of this issue in the Federal forum.

Under F.R.E. 702, scientific evidence must “assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>41</sup> This requirement has been generally interpreted by the *Daubert* Court as mandating that the scientific evidence in question be relevant, or alternatively, to use a term first coined by Judge Becker in the Third Circuit, that there be “fit” between the proffered testimony and the issue to be determined by the fact finder.<sup>42</sup>

Separate and distinct from the question of relevancy is the issue of the reliability of the proffered expert testimony. In serving a gatekeeper role with regard to questions of reliability, the *Daubert* Court identified a number of exclusive factors that might be considered by a court. These included:

1. falsifiability [whether the theory or technique in question could be or has been tested];
2. whether the theory or technique has been subject to peer review and publication;
3. the known or potential rate of error of the scientific technique; and
4. whether the theory is subject to “general acceptance.”<sup>43</sup>

---

<sup>39</sup> 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>40</sup> *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

<sup>41</sup> See FED. R. EVID. 702.

<sup>42</sup> See *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 742-43 (3d Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 513 U.S. 1190 (1995).

<sup>43</sup> *Daubert*, 509 U.S. at 593-94. In *Paoli*, the Third Circuit added the following three considerations to the four *Daubert* factors:

(1) the relationship of the preferred methodology to other techniques which have been established as reliable;

(2) the qualifications of the preferred expert to testify on the methodology at issue; and

In considering these factors, the Court was careful to instruct that the focus must be solely on principles and methodology, and not on the conclusions that they generated.<sup>44</sup>

On the face of the matter, it would appear that the *Daubert* decision greatly liberalized the process of admitting expert proofs into evidence. In practice, however, five years after *Daubert*, a debate still continues over who won and who lost under the decision, and there is considerable doubt as to whether or not, in practice, Federal courts have behaved any differently under *Daubert* than they did under the old *Frye* test.

In the recent decision *General Electric Co. v. Joiner*,<sup>45</sup> the United States Supreme Court determined that admissibility decisions under *Daubert* are for a trial judge to make, and that such decisions may only be reviewed by appellate courts on an abuse of discretion standard.<sup>46</sup> As a consequence of the *Joiner* decision, District Judges are vested with enormous discretion in interpreting *Daubert*, and most practitioners in the Federal forum appreciate that widely divergent results may be obtained based upon the predilections of the particular trial court. As Justice Stevens recognized in his partial concurrence and partial dissent in *Joiner*,<sup>47</sup> the same proof which the district court in that case deemed insufficient by the trial court under *Daubert* would have been upheld by the Supreme Court had the district court elected, in the exercise of its discretion, to receive the proffered testimony into evidence.<sup>48</sup>

To further complicate the *Daubert* picture and Federal jurisprudence, considerable doubt now exists as to whether the *Daubert* criteria, which are phrased in terms of what can be described as hard science, may also be applied to other types of technical expertise. Presently pending before the United States

---

(3) whether the method has been developed independently of litigation. *Paoli*, 35 F.3d at 742.

<sup>44</sup> *Daubert*, 509 U.S. at 595.

<sup>45</sup> 118 S. Ct. 512 (1997).

<sup>46</sup> *Id.* at 517.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 521-22 (Stevens, J., concurring/dissenting).

Supreme Court is *Carmichael v. Sam Yang Tire Co.*,<sup>49</sup> a case in which the Eleventh Circuit reversed the District Court's decision, precluding testimony on *Daubert* grounds, of a technical expert with experience in determining the cause of tire failures in automobiles.<sup>50</sup> The Circuit Court reasoned that the *Daubert* criterion made little sense in the context of evaluating the admissibility of experts whose experience was garnered from a professional career of investigating tire failures, rather than from the pursuit of some academic, scientific discipline. Presumably, the Supreme Court will, in the immediate future, shed further light on this subject. For now, however, it would appear that in the Federal forum there is relatively little certainty available in this field.

Another Federal development, albeit not strictly speaking addressed by the *Daubert* decision, has been the use, most particularly in the context of the silicone breast implant litigation, of court appointed panels pursuant to F.R.E. 706. The purpose of these panels is to obtain a "neutral" assessment by court appointed experts of proffered scientific proofs. The power of the court to appoint such expert panels is well established and may assist the court and possibly juries in grappling with difficult scientific concepts and in promoting settlement.<sup>51</sup>

One example of the actual use of a panel is reported in *Hall v. Baxter Health Care Corp.*<sup>52</sup> In that case, the district court, acting pursuant to F.R.E. 104 (rather than F.R.E. 706), appointed a panel of technical advisors in four apparently appropriate fields.<sup>53</sup> After a hearing at which the parties could be heard, the technical advisors submitted reports and gave counsel on both sides the opportunity to question the experts.<sup>54</sup> Thereafter, the court determined that the proffered scientific proofs would not be

---

<sup>49</sup> 131 F.3d 1433 (11th Cir.), *cert. granted sub nom.* Kumho Tire Co., Ltd. v. Carmichael, 118 S. Ct. 2339 (1998).

<sup>50</sup> *Id.* at 1437.

<sup>51</sup> See e.g., *In re Joint Eastern and Southern District Asbestos Litigation*, 982 F.2d 721, 750 (2d Cir. 1992).

<sup>52</sup> 947 F. Supp. 1387 (D. Or. 1996).

<sup>53</sup> *Id.* at 1392-93.

<sup>54</sup> *Id.* at 1393.

received into evidence.<sup>55</sup> In the multi-district consolidation of the breast implant cases, the District Court presiding over some 20,000 of these cases, has likewise appointed a panel, but did so pursuant to F.R.E. 706.<sup>56</sup> Likewise, in the asbestos litigation, and more particularly in the context of the Johns Mansville bankruptcy, the Honorable Jack B. Weinstein appointed a panel of experts to address the variety of knotty problems associated with that proceeding.<sup>57</sup>

There does not appear to exist any statutory or common law authority under New York State practice that would permit the appointment of such a panel in a state court proceeding.<sup>58</sup>

Although the concept of a court appointed panel has an obvious appeal, especially in the peculiar circumstances of a nationwide mass tort situation where genuine *Daubert* issues obviously exist, the practical problems entailed in constituting such a panel and the expense and delay that would obviously result from such a practice, militate against its use, except under extraordinary circumstances.

#### IV. THE *FRYE* RULE AS APPLIED BY THE NEW YORK COURTS

The seminal case addressing the standards for the admissibility of scientific proofs in supposedly novel areas is *Frye v. United*

---

<sup>55</sup> *Id.* at 1402-03.

<sup>56</sup> It is worth noting that the *Hall* court, mentioned above, has decided to wait for the report of the national panel before finalizing its decision. *Id.* at 1394-95. The report of this panel was published as this article was going to press.

<sup>57</sup> *In re Joint Eastern and Southern Dists. Asbestos Litig.*, 151 F.R.D. 540 (E. & S.D.N.Y. 1993); *Findley v. Falise (In re Joint Eastern and Southern Dists. Asbestos Litig.)*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995), *aff'd in part and vacated in part*, 78 F.3d 764 (2d Cir.), *aff'd without op.*, 100 F.3d 944 (2d Cir. 1996).

<sup>58</sup> The analogous practice in the medical malpractice arena of having a neutral panel of a judge, a lawyer, and a physician evaluate medical malpractice claims was enacted by the New York legislature, and then repealed several years later when, in practice, it proved to be time consuming and expensive without materially assisting in the resolution of malpractice cases.



*States*.<sup>59</sup> In *Frye*, the District of Columbia Circuit upheld a trial court decision to exclude, in a criminal case, a defendant's proffer of scientific proof concerning a systolic blood pressure deception test, a primitive form of the polygraph.<sup>60</sup> Holding that the test had not yet gained the requisite standing and recognition among physiological and psychological authorities to justify expert testimony based upon such a test, the Court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing form which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.<sup>61</sup>

The New York Court of Appeals formally embraced the *Frye* standard fifteen years after that standard was first enunciated.<sup>62</sup>

---

<sup>59</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1014.

<sup>62</sup> See *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938). New York has since used the *Frye* standard to determine the admissibility of scientific testimony based on polygraph examinations (*People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969); *People v. Forte*, 167 Misc. 868, 4 N.Y.S.2d 913 (Kings County Ct. 1938); *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938)), voiceprint analysis (*People v. Collins*, 94 Misc. 2d 704, 405 N.Y.S.2d 365 (Sup. Ct. Bronx County 1978); *People v. Rogers*, 86 Misc. 2d 868, 385 N.Y.S.2d 228 (Sup. Ct. Bronx County 1976)), hypnosis (*People v. Hults*, 76 N.Y.2d 190, 556 N.E.2d 2077, 557 N.Y.S.2d 270 (1990); *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983)), DNA testing (*People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 541, 611 N.Y.S.2d 97 (1994); *People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (Sup. Ct. Bronx County 1989)), drug influence tests (*People v. Quinn*, 153 Misc. 2d 139, 580 N.Y.S.2d 818 (Dist. Ct. Suffolk County 1991)), electrophoresis (*People v. Seda*, 139 Misc. 2d 834,

The principal Court of Appeals decision addressing the question of the receipt into evidence of possibly novel scientific proof is *People v. Wesley*.<sup>63</sup> In *Wesley*, the Court of Appeals, while noting the existence of *Daubert*, expressly declined to adopt that decision, and explicitly re-embraced the *Frye* standard. In explaining itself, the *Wesley* court expressly noted that *Frye* itself acknowledged the willingness of courts to “go a long way in admitting expert testimony deduced from a well recognized scientific principle,”<sup>64</sup> and also recognized that the methodology or principle at issue need not be universally endorsed so long as it is generally accepted as reliable.<sup>65</sup> Moreover, both *Wesley* and *Frye* make plain that the inquiry on “general acceptance” must be addressed to the relevant scientific community, but left to the trial court the determination on a case by case basis of what that community might be.

In all events, once the *Frye* general acceptance inquiry has been resolved, the *Wesley* court explained that the second step for the court became a routine evaluation of whether there was an appropriate trial foundation for the admissibility of the specific evidence advanced.<sup>66</sup> Such inquiry might concern itself with chains of custody and the like, or proof that the specific procedures followed in the particular case were of the type determined to have met the general reliability test. In this context

---

529 N.Y.S.2d 931 (Sup. Ct. New York County 1988)), rape trauma syndrome (*People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.3d 883 (1990); *Gutierrez v. Iulo*, 156 Misc. 2d 79, 591 N.Y.S.2d 711 (Sup. Ct. New York County 1992)), acute grief syndrome (*People v. Burton*, 153 Misc. 2d 681, 590 N.Y.S.2d 972 (Sup. Ct. Bronx County 1992)), psychological factors regarding witness perception and memory (*People v. Mooney*, 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990)), neonaticide syndrome (*People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996)), spinocope tests (*Castrichini v. Rivera*, 669 N.Y.S.2d 140 (Sup. Ct. Monroe County 1997)), and identification through bite marks (*People v. Middleton*, 54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581 (1981)).

<sup>63</sup> *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 541, 611 N.Y.S.2d 97 (1994).

<sup>64</sup> *Id.* at 422-23, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.

<sup>65</sup> *Id.* at 423, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.

<sup>66</sup> *Id.* at 428-29, 633 N.E.2d at 457, 611 N.Y.S.2d at 103.

also, the reliance upon data of the type traditionally relied upon by experts in the field comes into play, since non-record evidence and data may now expressly be used by experts.

Finally, after the *Frye* test has been satisfied and the proper foundation laid for the admissibility of the scientific proof, it is left to the jury, as a fact finder, to weigh credibility and consider possible infirmities in the collection and analysis of data.<sup>67</sup>

In addressing the *Frye* general acceptance question, it is also clear that a *Frye* hearing is not mandatory and that a trial court may receive novel scientific proof without resorting to a full fledged hearing.<sup>68</sup> For instance, objections to either trial foundation or the weight of evidence must plainly be addressed at the time of trial.<sup>69</sup> Moreover, general acceptance of scientific principles may be shown through appropriate writings and even judicial opinions, thereby rendering a *Frye* hearing unnecessary on that basis as well.<sup>70</sup>

With respect to the question of the burden of proof relating to proffers of novel scientific expert testimony, the onus in the first instance is upon the party resisting the evidence to voice objection to the proffer, and to make some showing that a *Frye* inquiry is called for. Thereafter, it would appear to be the burden of the party offering the proof to establish that the *Frye* test had been met.

Most likely, in civil litigation, and indeed even in criminal litigation, it would appear that the party proffering the proof must meet the preponderance of the evidence standard.<sup>71</sup> However, there even exists authority for the proposition that the standard for admissibility is merely the existence of credible evidence that

---

<sup>67</sup> *Id.* at 429, 633 N.E.2d at 458, 611 N.Y.S.2d at 104.

<sup>68</sup> *Id.* at 426, 633 N.E.2d at 456, 611 N.Y.S.2d at 102; *See also* *People v. Middleton*, 54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581 (1981); *In re Lahey v. Kelly*, 71 N.Y.2d 135, 518 N.E.2d 924, 524 N.Y.S.2d 30 (1987).

<sup>69</sup> *Wesley*, 83 N.Y.2d at 426, 633 N.E.2d at 456, 611 N.Y.S.2d at 102; *People v. Serrano*, 219 A.D.2d 508, 631 N.Y.S.2d 340 (1st Dep't 1995).

<sup>70</sup> *Lahey*, 71 N.Y.2d 135, 518 N.E.2d 924, 524 N.Y.S.2d 30; *People v. Morales*, 227 A.D.2d 648, 643 N.Y.S.2d 217 (2d Dep't 1996).

<sup>71</sup> *See, e.g., In re M.Z.*, 155 Misc. 2d 564, 590 N.Y.S.2d 390 (Sup. Ct. Onondaga County 1992).

the *Frye* standard has been met, rather than the preponderance of the evidence standard, since the credibility question involved in weighing the evidence should be expressly left to the jury.<sup>72</sup>

In all events, it would appear that in New York State practice, the problems of dealing with expert proofs, both from a substantive and procedural perspective, are somewhat more settled than in Federal practice. Generally speaking, trial courts deal with such issues in the context of trial proceedings and do so efficiently and with a minimal of expense and delay. It might also be added, in this respect, that in New York State appellate practice, the Appellate Divisions expressly possess the ability to review the fact-finding of the trial court whether in this *Frye* context or otherwise, and thus can impose a greater uniformity and predictability in this area than exists in the Federal forums in the wake of the *Joiner* decision.

### CONCLUSION

Although New York State and Federal forums individually profess to a liberal approach toward the receipt of novel scientific proofs relying upon “traditional standards of relevancy” rather than specialized tests, plainly there are significant differences both substantively and procedurally in the manner in which the two systems address this issue.<sup>73</sup> Presently, notwithstanding the considerable effort and commentary that has occurred in the federal system over this issue in the wake of the *Daubert* decision, it may well be that New York State practice in this area is, practically, a superior approach to the problem by virtue of its more streamlined and cost conscious approach, as well as the greater certainties that currently exist with its substantive and procedural law.

---

<sup>72</sup> See *In re Meyer*, 132 Misc. 2d 415, 504 N.Y.S.2d 358 (Fam. Ct. Kings County 1986) (received into evidence polygraph proof in a child custody proceeding).

<sup>73</sup> See *Wesley*, 83 N.Y.2d at 426, 633 N.E.2d at 456, 611 N.Y.S.2d at 102; see also *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

Obviously, at this point, it is not possible to make more than preliminary observations concerning the disparities that presently exist between New York and Federal law in this volatile area. Only the future can determine whether the disparate approaches now in place in the two forums will yield disparate outcomes.