

New Clarity On Expert Testimony In Pa. State Courts

By **Louis DePaul and Carolyn Boucek** (August 22, 2019, 3:22 PM EDT)

Understanding whether the procedural laws of the forum or other substantive laws apply is paramount to effectively managing a litigation — and a failure to properly anticipate which law applies risks putting your client in a perilous position. Generally speaking, while parties can agree to apply the substantive law of a state outside the forum, the forum state will almost always apply its own procedural laws.[1]

In Pennsylvania, among other states, the question of whether an issue is substantive or procedural is a procedural issue in itself, and therefore the forum state's laws govern whether to apply the forum's substantive law.[2] Pennsylvania courts define substantive laws as the laws that create the parties' rights and duties. By contrast, procedural laws are the set of rules that establish the mechanism through which the parties seek to have their substantive rights judicially enforced.[3]

The Pennsylvania Superior Court recently provided a reprieve from the uncertainty as to which state's law applies to govern the sufficiency of expert testimony, in *T.M. v. Janssen Pharmaceuticals*.[4] There, the Superior Court ruled that, in Pennsylvania, the sufficiency of expert witness testimony is a procedural law issue and, accordingly, Pennsylvania law applies to resolve challenges to expert testimony in Pennsylvania state court, regardless of which state's substantive law is being applied.[5]

Following *Janssen Pharmaceuticals*, in Pennsylvania state courts, all expert witnesses must meet the Pennsylvania standard for expert admissibility, which follows the guidelines espoused in *Frye v. United States*.[6] Generally, under the *Frye* standard, an expert must first be qualified as an expert by knowledge, skill, experience, training or education, and can only provide testimony if the expert's specialized knowledge: (1) is beyond the knowledge possessed by the average layperson; (2) will help the fact-finder to understand the evidence or determine a fact at issue; and (c) the expert's methodology is generally accepted in the relevant field.[7]

The revelation that Pennsylvania courts apply Pennsylvania law to resolve issues of expert sufficiency in all instances may seem trivial or obtuse, but it is the result of a nuanced approach to a complicated area of law — and has far-reaching consequences for Pennsylvania practitioners.

Superior Court Decision: *T.M. v. Janssen Pharmaceuticals*

On July 16, 2019, the Superior Court of Pennsylvania unanimously decided *T.M. v. Janssen Pharmaceuticals*, holding that the sufficiency of expert testimony is a procedural issue and the law of the forum-state should apply to decide it.

The plaintiffs in *Janssen Pharmaceuticals* lived in Texas when their son, T.M., was prescribed and began taking Risperdal to treat his attention deficit hyperactivity disorder. After T.M. developed gynecomastia, the plaintiffs brought a product liability claim on behalf of T.M. in Pennsylvania, alleging that defendant pharmaceutical manufacturer, Janssen, failed to adequately warn of the risk of gynecomastia associated with treating children who have ADHD with Risperdal.[8] The parties



Louis DePaul



Carolyn Boucek

agreed to apply Texas substantive law.[9]

During the trial, the plaintiffs offered the expert testimony of Dr. Mark Solomon, a plastic surgeon with expertise in gynecomastia and breast diseases as evidence that Risperdal caused T.M.'s gynecomastia.[10] After the plaintiffs concluded their case, the court granted Janssen's motion for a nonsuit ruling that the plaintiffs failed to meet the general or specific causation requirements for reliability of scientific evidence under Texas law with regard to Solomon's causation testimony, and, therefore, that the plaintiffs failed to establish the necessary components of their claim under Texas law.[11]

On appeal, the Pennsylvania Superior Court reinstated the case — holding that, even though the parties agreed that Texas law applied, the trial court erred in applying Texas law to determine the sufficiency of Solomon's testimony.[12] The Superior Court explained that because evidentiary issues, like as the sufficiency of expert testimony, are procedural, Pennsylvania law applies to resolve disputes regarding those evidentiary issues. Thus, the trial court should have applied Pennsylvania law — an inquiry that would have resulted in applying Pennsylvania procedural law to determine the sufficiency of the plaintiffs' expert testimony.

Evaluate Procedural and Substantive Distinctions in Every Forum

Pennsylvania is not alone in applying the law of the forum state to determine the sufficiency of expert testimony.

Numerous other jurisdictions — including, inter alia, Delaware, Idaho, Texas, Maryland, Nebraska, New York and Iowa — apply their own procedural law to determine evidentiary issues.[13]

Implications for an Effective Legal Practice

Janssen Pharmaceuticals highlights the importance of vigilant preparation and detailed attention to procedural rules. Now that the Superior Court has clarified the applicable standard regarding the sufficiency of expert testimony in Pennsylvania, savvy lawyers who litigate regularly in Pennsylvania can use that clarity to their clients' advantage by streamlining their expert acquisition and preparation process to comport with the Pennsylvania standard.

Parties to future litigation can use this clarity to prepare as well. For instance, it can help inform a decision when initiating a lawsuit to avoid litigating in a particular forum where the expert sufficiency standard is not favorable. By contrast, future defendants can consider Pennsylvania expert sufficiency standards against the federal Daubert standard in deciding whether to remove an action to federal court.

Unlike substantive law, which can be chosen by parties to a contract in a choice of law provision or through stipulation, parties cannot contract around the procedural laws of the forum state. Accordingly, transactional attorneys can also learn from Janssen Pharmaceuticals to serve their clients by considering the impact of the forum state's expert testimony admissibility and sufficiency standards in negotiating forum selection clauses.

Louis A. DePaul is a member and Carolyn O. Boucek is an associate at Eckert Seamans Cherin & Mellott LLC.

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[1] See e.g., [Sheard v. J.J. DeLuca Co. Inc.](#) , 92 A.3d 68, 76 (Pa. Super. Ct. 2014); [Ferraro v. McCarthy-Pascuzzo](#) , 777 A.2d 1128, 1137 (Pa. Super. Ct. May 21, 2001); [Larrison v. Larrison](#) , 750 A.2d 895, 898 (Pa. Super. Ct. 2000).

[2] See [Foley v. Pittsburgh - Des Moines Co.](#) , 68 A.2d 517 (Pa. 1949); see also [Penny v. Powell](#) , 347 S.W.2d 601, 602 (Tex. 1961) (Ruling that whether an issue is procedural or substantive is a

procedural matter in Texas and the law of the forum state will apply to resolve it); see, e.g., [Danielson v. National Supply Co.](#) , 670 N.W.2d 1, 5 (Minn. Ct. App. 2003) (using Minnesota law to decide if the issue was procedural or substantive for a conflict of law analysis).

[3] [Sheard](#), 92 A.3d at 76.

[4] [T.M. v Janssen Pharms. Inc.](#) , No. 184 EDA 2018, 2019 WL 3162069 (Pa. Super Ct. July 16, 2019).

[5] *Id.* at *11.

[6] [Frye v. United States](#) , 293 F. 1013 (D.C. Cir. 1923). See [Commonwealth v. Topa](#) , 471 Pa. 223, 231–32 (Pa. 1977) (expressly adopting the Frye standard in Pennsylvania).

[7] See [Frye](#), 293 F. at 1014; Pa. R. Evi. 702(a)–(c); see also [Daniel v. Wyeth Pharms. Inc.](#) , 15 A.3d 909, 925–26 (Pa. Super. Ct. 2011); compare [Daubert v. Merrell Dow Pharms. Inc.](#) , 509 U.S. 579 (1993) (setting out the standard for admitting expert testimony in federal courts).

[8] [Janssen Pharms. Inc.](#), 2019 WL 3162069, at *1.

[9] *Id.* at *1 n. 3.

[10] *Id.* at *4.

[11] *Id.* at *5

[12] *Id.* at *10–11.

[13] See e.g., [Hystro Prods. Inc. v. MNP Corp.](#) , 18 F.3d 1384, 1387–88 (7th Cir. 1994); [Sulak v. American Eurocopter Corp.](#) , 901 F.Supp.2d 834, 841–42 (D.N. Tex. 2012); [Wetzel v. Eaton Corp.](#) , 62 F.R.D. 22, 26 (D. Minn. 1973); [Tumlinson v. Advanced Micro Devices Inc.](#) , C.A. No. 08C-07-106FSS, 2010 WL 8250792, at *3 (Del. Super. Ct. July 23, 2010); [Carroll v. MBNA America Bank](#) , 220 P.3d 1080, 1085–86 (Idaho 2009); [Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A Ltd.](#) , 249 S.W.3d 380, 388–89 (Tex. 2008); [Mason v. Lynch](#) , 878 A.2d 588, 590 n. 1 (Md. 2005); [Crafton v. Union Pac. R.R. Co.](#) , 585 N.W.2d 115, 122 (Neb. Ct. App. 1998); [Smithco Eng'g. v. Int'l. Fabricators](#) , 775 P.2d 1011, 1015 (Wyo. 1989); [People v. Benson](#) , 88 A.D.2d 229, 231 (N.Y. App. Div. 1982); [Everett v. Bucky Warren Inc.](#) , 380 N.E.2d 653, 656 (Mass. 1978); [Brooks v. Engel](#) , 207 N.W. 2d 110, 114 (Iowa 1973); see also, Restatement (Second) of Conflicts of Laws § 138 (2019) (“The local law of the forum determines the admissibility of evidence”); Restatement (Second) of Conflicts of Law § 135 (2019) (“The local law of the forum determines whether a party has introduced sufficient evidence to warrant a finding in his favor on an issue of fact”); cf., [Cotroneo v. Shaw Envtl. & Infrastructure Inc.](#) , Civil Action No. H-05-1250, 2007 WL 3145791, at *9–10 (S.D. Tex. 2007) (finding that the sufficiency of evidence in toxic tort cases is a substantive issue under [Merrell Dow Pharms. v. Havner](#) , 953 S.W.2d 706 (Tex 1997) and therefore Texas law applies to decide it.); [Cano v. Everest Minerals Corp.](#) , 362 F. Supp. 2d 814, 821 (W.D. Tex. 2005) (same).