

- i. Soft Mineral - Value number 1 on hardness scale. It can be easily scratched or broken apart. As a result it has specific uses in pharmaceutical industry
 - 1. Mining - Out west in Montana
 - a. Found throughout the world
 - b. Talc Deposits - mostly in metamorphic rocks
 - c. Mined all over the world
 - 2. Characteristics
 - a. Can absorb moisture
 - b. Not soluble in water
 - 3. Example of Uses
 - a. Paint
 - b. Paper Industry
 - c. Rubber
 - d. Cosmetics
 - e. Ceramics
 - f. Electrical switchboards
 - g. Cosmetics
 - h. Lubricant
 - i. Coat inside of inner tubes and rubber gloves
 - j. Baby powder to prevent diaper rash
 - i. Use can cause a cloud - Respiratory problems for baby
 - k. French Chalk
 - l. Food Additive
 - m. In EU - used as a buffering agent for white rice
 - n. ceramics
 - 4. Personal care products
 - a. Most known in US is Baby Powder
 - i. Johnson and Johnson first offered in 1893 - baby company. Came in metal tin for toilet and nursery use.
 - 1. Advertised with largest ad company in company history.

- ii. Used for all sorts of personal use outside of babies- primarily marketed to woman.

III. Two Major Types of Talc Litigation:

- a. "Direct" talc exposure claims (talc itself causes illness/disease)
 - i. Personal Use of product or use by a parent on a child
 - 1. repeated exposure caused their disease.
 - ii. Proximate Causation
 - 1. exposure was in fact legal and proximate cause of the disease
- b. Contaminated talc (asbestos)

IV. "Direct" talc exposure claims

- a. that is was scientifically possible
- b. Causation and expert admissibility (Medical Testimony)
 - i. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
 - 1. Minority View in Country
 - 2. First standard to be applied to scientific evidence and testimony. To testimony can be told until Frye statart applied
 - 3. Facts - Murder - defendant wanted to introduce history of scientific that he passed a lie detector test.
 - a. Matter beyond common knowledge of jury
 - b. Deduction may have GENERAL ACCEPTANCE in the particular field in which it belongs
 - c. Referred to as the **GENERAL ACCEPTANCE TEST**
 - d. On the fringe and not established not acceptable.
 - i. Can be somewhat subjective

- e. Federal Rules of Evidence 702- Frye standard in New Jersey
- f. Florida - Frye is the appropriate test - a 4-3 decision
 - i. Invalidated a statute Interpreting a 2013 law seeking to codify the law. Found it was unconstitutional
 - ii. Overturned \$8 million verdict of asbestos in a cigarette filter.
- g. Scientific community is the gatekeeper and determines evidence admissibility. If they find it acceptable the court must admit the evidence.
 - i. Courts visit issue once
 - ii. More relaxed standard
 - iii. If experts can convince the courts that it is accepted then it becomes admissible.
- ii. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
 - 1. Majority view - 31 States apply**
 - 2. Facts - Petitioner asserted child suffered birth defects of mothers using bendectin. Looked a Frye standard 702. Said that rule 702 doesn't stay General Acceptance is the rule
 - i. Scientific reasoning and methialticy
 - ii. Can be applied with issue at hand.
 - b. Daubert 5 Factors:**
 - i. Whether the theory or technique in question can be and has been tested
 - ii. whether it has been subjected to peer review and publication;
 - iii. The known or potential error rate;
 - iv. the existence and maintenance of standards controlling its operation;

- v. whether it has attracted widespread acceptance within a relevant scientific community.

3. Flexible standard

- a. Cross examination
- b. And introduction of contradictory evidence
- c. **Major difference from Frye: The Judge becomes the gatekeeper - not the scientific community**

- 4. Can always be evaluated on a case by case basis
- 5. Admits evidence that courts find reliable but might not be generally accepted.

iii. Other - catch alls -

- 1. North Dakota - Governed by ND 702 Rule of Evidence
- 2. Virginia - admissible if it will assist the trier of fact in understanding evidence

V. Contaminated talc claims

a. What is asbestos?

- i. Not supposed to disturb it
- ii. Was considered a miracle material
 - 1. resistance to chemicals
- iii. Mineral like talc mined from the ground

b. Asbestos products

- i. Used in over 3,000 products
 - 1. Gaskets
 - 2. Cars
 - 3. Buildings
 - 4. Children's science kits

c. Danger when fiber become airborne and inhaled

- i. Lungs can't handle the sharp fibers
- ii. Asbestosis:
 - 1. Scarring of the lung disease
- iii. Cancers linked to asbestos

1. Lung
2. Kidney
3. Larynx
4. Mesothelioma - Most common
 - a. Cancer of the lining of the lungs and chest cavity
 - b. Abdominal cavity
 - c. Universal fatal
- d. History of asbestos litigation
 - i. Longer history of litigation than Talc
 - ii. Over 50 years - first filed in 1966
 - iii. Longest most expensive mass tort in history of U.S.
- e. Contamination of talc by asbestos
 - i. Claim this was well known by the industry
 - ii. As talc is mined so is asbestos and gets caught up.
 - iii. Returns report
 1. stating that talcum powder contained asbestos for decades and that Johnson and Johnson knew that their talc powder tested positive for asbestos. Their shares tumbled.
 - iv. Johnson and Johnson Disputed it.
- f. Causation issues/Epidemiology
 - i. Scarcity of Epidemiology evidence
- g. American cancer society on Talc:
 - i. Findings have been mixed.
 1. Some studies say increased risk or no risk. These studies can be biased because relied on memoirs of people who have used talc powder in the past.
 - ii. American cancer society concludes that overall risk is small.
 - iii. Research in area continues.
 - iv. There is no consensus in the scientific community.

VI. Cosmetic Talc Litigation

VII. Future of Talc Litigation

