

EXPERT TESTIMONY IN CIVIL RIGHTS CASES

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The outline describes recent changes to the Federal Rules of Evidence with respect to expert and opinion testimony, and summarizes a sample of recent police misconduct and housing discrimination cases in which expert testimony was proffered.

I. Recent Amendments to Federal Rules

As of December 1, 2000, the following are the Federal Rules of Evidence which control expert testimony.

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The last clause was added with the intention to eliminate the evading of reliability requirements by denominating a witness as a lay witness, rather than an expert.

Note that a witness may give both lay and expert testimony, e.g., a police training officer called by the defense. His description of the training the police received is simply factual, but opinions about why a given technique is taught or about the officer's proficiency level are expert opinions.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The rule was amended in order to codify the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 506 U.S. 738 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The rule was amended to make it more difficult to improperly place inadmissible evidence before the jury under the guise of setting for the basis for the expert's opinion.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

II. Reliability Requirements under Daubert, Kumho

Rationales for need for reliability determination.

- A. "Black box" scientific testimony.
- B. Juror difficulty in assessing the significance of testimony – probabilistic issues – forensic science.
- C. Experts' reliance on vicarious experience.
- D. General tendency of jurors to be overwhelmed by experts.

II. Qualifications

Egebergh v. Sheahan, 2001 WL 15945 (N.D.Ill. 2001) (court denies defendant's motion to strike report of plaintiff's expert in the area of police standards, procedures and practices for medical care of pre-trial detainees).

Plaintiff's expert qualified as an expert on police procedure. He had approximately seventeen years of law enforcement experience, a certified police instructor and a diplomat of the American Board of Forensic Examiners and Law Enforcement Experts, and a CALEA assessor, which requires knowing which standards are current and applicable to police agencies that are being assessed. To stay current, the expert read journals, attended seminars and conferences and interacted with people in the field.

The defendant argued that the expert was not competent to testify because he was not qualified in medicine or the medical care of pre-trial detainees. The court noted that his testimony was not offered to provide medical opinions, but with respect to the purpose and importance of procedures and as to the proper police response to established medical needs. The court found that the expert was qualified to describe what defendants should have and could have done to avoid the death.

The court rejected the defendant's argument that the expert's opinions were not based on scientific, technical, or other specialized knowledge. It noted that his methodology consisted of evaluating the specific facts of a case in light of the policies in place, using his own knowledge and expertise of law enforcement procedures. The court relied on circuit precedent for the proposition that "genuine expertise may be based on experience or training." *Tyrus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996).

Rosado v. Deters, 5 F.3d 119 (5th Cir. 1993)(no abuse of discretion in court's decision to exclude testimony by accident reconstruction expert that officer had backed police car being used as roadblock into path of oncoming motorcyclist, causing collision in which motorcyclist was killed).

The court found no abuse of discretion in the district court's decision to refuse to allow plaintiff's expert to give his opinion on whether the officer backed his car into the decedent because the expert was not qualified as an accident reconstructionist. He had last qualified as an accident reconstructionist in 1965. Since that time, he had not taken any refresher courses. The witness admitted that he could not independently establish the necessary physical and mathematical bases for his opinion.

In *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1993), the court found the plaintiff's expert poorly qualified. He did not have the necessary expertise to testify that the failure to discipline officers other than the defendant was the proximate cause of the defendant shooting plaintiff's decedent. The court applied the *Daubert* factors to the testimony. There was no testing, no peer review, no demonstration of general acceptance. The court concluded there was no general field of "proper police practices and procedures."

IV. Liability Issues - Police Misconduct Cases

A. Some Questions

1. What standards does the expert use to judge police practices? There are the International Association of Chiefs of Police (IACP) and Commission on Accreditation of Law Enforcement Agencies (CALEA) standards. Many experts collect standards from departments around the country. There is published literature about police tactics and administration, and published and unpublished training materials. Should the expert use national standards or local standards?

For example, in *Butera v. District of Columbia*, 83 F.Supp. 2d 25 (D.D.C. 1999) (suit for death of undercover officer), the court found the DEA Handbook and Manual to set a national standard. In *Thompson v. City of Meriden*, 1999 W.L. 301693 (D.Conn. 1999), the court noted, “deliberate indifference also may be shown through expert testimony that a practice condoned by the municipality was contrary to the practice of most departments, and presented an unusually high risk that constitutional rights would be violated.”

2. When will an expert be permitted to testify respecting the “ultimate issues” in the case? Some cases draw a distinction between legal conclusions and factual ultimate issues.

See, for example, [*Hygh v. Jacobs*, 961 F.2d 359, 364 \(2d Cir.1992\)](#) (in excessive force case, expert testimony that arresting officer's conduct was "not justified under the circumstances" should have been excluded as "conclusory condemnation" that merely told jurors what result to reach).

The court noted that while Rule 704 had abolished the ultimate issue rule, it has not “lower[ed] the bars so as to admit all opinions,” citing the Advisory Committee’s Note to Fed.R.Evid. 704. The court noted its agreement with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion. See *United States v. Scop*, 846 F.2d 135, 140 (2d Cir.1988); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir.1985); *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 685-86 (8th Cir.1981); *Marx & Co. v. Diners’ Club, Inc.*, 550 F.2d 505, 510-12 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). As had the courts in *Torres*, 758 F.2d at 150 and *Strong*, 667 F.2d at 686, the court relied on the Advisory Committee Note:

Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, “Did T have capacity to make a will?” would be excluded, while the question, “Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?” would be allowed.

The court reasoned that “Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury.”

The court rejected testimony by the expert that the officer’s conduct was not “justified under the circumstances,” not “warranted under the circumstances,” and “totally improper.” (364) The court found no difference between such testimony and a conclusion that the defendant’s conduct was “negligent,” which, in the language of the advisory committee, “merely [told] the jury what result to reach.” Fed.R.Evid. 704, Advisory Committee’s Note.

Nonetheless, the court concluded that admission of the expert’s testimony was harmless. The “impermissible testimony was expressed within a larger body of otherwise unobjectionable testimony concerning police procedures involving violent arrestees from which the jury could easily have drawn the same conclusions that Cox did.” (365) The evidence that the officer used excessive force was strong and the jury was properly instructed that it could reject expert testimony if it disagreed with it.

3. How do the courts approach difficult problems of causation both in municipal liability cases and with respect to individual liability?

For example, in *Estate of Macias v. Lopez*, 42 F.Supp. 2d 957 (N.D. Cal. 1999), rev’d. on other grounds, 2000 U.S.App. Lexis 17377 (9th Cir. 2000), the plaintiff had to prove that “but for” the lack of police action the murder of a domestic violence victim would not have occurred. The court did not apply *Daubert*, but did perform a gatekeeper role. The court allowed experts to testify to police practice and procedure, and to the effectiveness generally of domestic violence intervention and counseling. The court did not

permit, however, expert testimony establishing a direct link between the murder and police conduct, concluding that would be speculation. As a result, the court concluded there was no triable issue of fact.

B. Illustrative Cases

Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998)(court did not abuse its discretion in admitting police officers' expert testimony concerning dangerousness of carrying concealed knives and how to arrest individuals carrying concealed knives in bars). The expert witnesses were the defendant's instructors from the police academy. They testified that "knives are dangerous," (375) and "alcohol and knives don't mix well." (376) One expert testified that a street criminal often uses a knife as a weapon of choice "because it's silent, it's easily concealable, it's usually looked upon as less criminal in nature than [a] gun so you'll get less of a penalty for carrying it." (376) The expert made the practical point that a knife "never runs out of ammunition." (376)

The court noted that the testimony was not "earth-shattering" and "probably overlapped with the jurors' own experiences." (376) Nonetheless it was held admissible. The court concluded that, "all you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury," and that knowledge of police training is specialized. (376)

Pena v. Leombruni, 1999 WL 1277525 (7th Cir. 1999). Jury did not require expert testimony on whether it was reasonable for officer to use deadly force when confronted by assault by decedent.

Kerman v. DiLucia, 2000 WL 1056315 (S.D.N.Y. 2000)(precluding testimony of plaintiff's expert, former police captain, concerning manner of entry into apartment and methods of handling alleged emotionally disturbed person).

Plaintiff alleged that defendants entered his home without a warrant, seized him and used excessive force while removing him to a hospital against his will and without probable cause. Much of his expert's testimony was struck because the court had already granted summary judgment against the plaintiff on the counts to which it was relevant. The court also refused to permit his testimony that excessive force was used on plaintiff "by dragging him handcuffed up the stairs" and by handcuffing him while he was in the restraint bag as he was transported to the ambulance. The expert offered no basis for these opinions. The court concluded that the expert's testimony "would not provide the jury with specialized knowledge that would facilitate the jury's understanding of the evidence," but that "his conclusory assertions would encroach upon the role of the jury." The court concluded that the expert evidence proffered was not necessary for the jury to determine whether there was unreasonable force under the circumstances.

Schieber v. City of Philadelphia, 2000 WL 1843246 (E.D.Pa. 2000)(granting in part and denying in part motions to preclude testimony from police practices expert on propriety of officers' actions, police department's training for rescue calls and management control over records of rape complaints).

The court approved of the methodology of plaintiff's well-qualified police practices expert. The expert reached his conclusions by reviewing depositions and other materials and applying his experience, training and skills to the facts provided to him. The court concluded that while this was "not a formal, testable method, it is the one used by police practices experts and accepted by the courts." In this respect the court cited *United States v. Hankey*, 203 F.3d 1160, 1169-70 (9th Cir. 2000) (accepting a police gang expert's testimony whose opinions were based on his "street intelligence" about gang behavior when the expert demonstrated "that the information upon which he relied is of the type normally obtained in his day-to-day police activity.") and *United States v. Alatorre*, 222 F.3d 1098, 1104 (9th Cir. 2000) (accepting the expert testimony of a customs service special agent on narcotics smuggling and sale based on his twelve years experience as a special agent, specialized training and extensive knowledge as a result of his work as a case agent and in other related capacities).

The expert testified that the officers had a duty to enter decedent's apartment, based on the facts that police they had received a Priority 1 Emergency 911 call of a woman screaming; the neighbor who made the 911 call was on the scene and spoke with the officers; and the officers had no other calls pending. Based upon the fact that there was a complainant on the scene who was certain that he heard the woman screaming inside her apartment, the expert opined that police chiefs would unanimously agree that exigent circumstances required officers to force open the door to her apartment. The expert reviewed and relied upon case law on exigent circumstances in determining whether an officer has authority, under the Fourth Amendment, to make a warrantless entry into a home for rescue purposes.

At the same time, the court rejected the expert's opinion that the municipality's failure to train caused a violation of decedent's constitutional rights, holding that it reached a legal conclusion to which the expert could not testify. The court cited: *Whitmill v. City of Philadelphia*, 29 F.Supp.2d 241, 246 (E.D.Pa.1998)("As a general rule an expert's testimony on issues of law is inadmissible."). See also *Nieves-Villaneuva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir.1997)("[Fed.R.Evid.704\(a\)](#) ... does not vitiate the rule against expert opinion on questions of law."); *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir.1994), cert. denied, 513 U.S. 1111 (1995)("When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue. * * * It is

the responsibility of the court, not testifying witnesses, to define legal terms.").

The court ruled, however that the expert could state his opinion that the municipality failed adequately to train its officers regarding home entry under exigent circumstances for the purpose of rescue. This opinion was based on his review of the police department's training materials and conclusion that they were inadequate. The expert compared Philadelphia unfavorably with two other major cities that he found provided better training on exigent circumstances. The expert had himself trained officer and designed training materials for officers and the court concluded that his opinion about such matters would assist the jury.

The expert also proffered an opinion that the previous management of the police department had allowed and tolerated practices promoting the systemic practice of downgrading rapes and that this had an effect on the handling of rescue calls. The expert cited specific incidents that had been downgraded. He opined that downgrading prevented the emergence of a pattern alerting the police to the modus operandi of the Center City Rapist a particular rapist and affected their response. The court concluded that the witness, who had done considerable consulting, including with the FBI, and had spent almost thirty years in law enforcement in one capacity or another had the expertise effectively to help the jury on this issue.

C. Reconstructions

Estate of Fuentes v. Thomas, 2000 WL 1114892 (D.Kan. 2000)(court considers discovery issues and substantive objections to proposed testimony of plaintiff's medical expert who would testify concerning, inter alia, the position of plaintiff's decedent's hands when shot).

Plaintiff called a medical doctor to testify that the decedent's hands were raised upward in a probable "surrender" position and not pointing towards the officer when he was shot in the forearms and in the back; that the manner of death was homicide; that decedent's mental function or judgment was not impaired by the level of cocaine and alcohol in his system at the time of his death; and that decedent was holding a gun in his right hand at the time he was shot and dropped it when his right forearm was struck by the officer's bullet.

Defendants argued that the doctor's methodology was not reliable. The expert's deposition and other materials before the court did not specify what methodology the doctor used, the facts which constituted the bases for his opinions and how the facts or bases lead to those opinions. The court ordered a *Daubert* hearing to develop those matters.

The court did determine that permitting the doctor to testify that the decedent's hands were in a "surrender" position would merely tell the jury how to decide the issue.

The court held that the doctor would not be allowed to testify, based upon an assumption, that decedent's gun was in his right hand when he was shot. However, it ruled that if evidence were presented at trial that he carried his gun in one hand or the other, the doctor would be allowed to express his opinion, based upon the injuries to the decedent, whether he would have dropped the gun from that hand and how long he could have maintained his grip.

Schieber v. City of Philadelphia, 2000 WL 1670888 (E.D.Pa. 2000)(granting in part and denying in part motions to preclude testimony from forensic pathologist that plaintiff's decedent was alive when officers responded to an emergency 911 call).

All of the parties' experts agreed there is no scientific method to determine the precise time of death. The court noted that there are some scientific methods for determining approximate time of death, such as analysis of rigor mortis, lividity, body temperature, eye fluid potassium levels, and autopsy examination of stomach contents. Many of these tests and analyses were not performed on decedent's body and, in any event, given the time that elapsed between the death, finding the body and the autopsy, they would not have been as accurate as otherwise.

Without results of such scientific clues, the plaintiff's expert, Dr. Michael Baden established a time of death primarily based on the circumstantial and environmental evidence surrounding the victim's death. He reviewed the autopsy report, toxicology report, medical examiner file, crime scene photographs, autopsy photographs, transcripts of 911 calls, police reports, the complaint, a memorandum of the court, interviews with officers and the initial responding neighbors, the deposition transcript of the doctor who performed the autopsy, and microscopic slides prepared from autopsy tissue of decedent's larynx.

The court found that the circumstantial and environmental evidence was reviewed by the expert within scientifically based parameters. It was undisputed that the cause of death was manual strangulation. The pathologist's conclusion regarding the time of death was based upon a generally accepted understanding of the length of time it takes for manual strangulation to cause unconsciousness, then brain death and finally, cessation of heart beat. This was based upon his review of textbooks and histories of people who have died of manual strangulation. The expert considered when the neighbor heard her cry out for help, when the 911 call was placed, evidence of defensive injuries found on the victim's body and the disarray at the crime scene itself. He applied these considerations to the scientifically-based three-phase chronology of how and how long death by manual strangulation takes to occur (three minutes for her to lose consciousness, five to eight minutes more for brain death, and then an additional five to ten minutes for the heart to stop beating – the ranges are variable based upon the size of the coronary arteries of the victim, the victim's age, sex and general overall health, the victim's position at the time of strangulation, and whether there was a

struggle).

The expert also expressed the opinion that if the officers had forced the door open when they arrived on the scene, they could have resuscitated the decedent, based on the same three-phase chronology and circumstantial evidence. The court found that both of the expert's opinions met the *Daubert* criteria and were admissible.

Dr. Baden also expressed an opinion that the decedent was gagged or otherwise physically prevented from crying out for help, based on physical evidence of mouth injuries, including bruising and a "bite mark type laceration of the tongue." The doctor concluded that these injuries were consistent with the application of a gag or pressure on the mouth based upon his experience with similar injuries in the past and police reports of similar crimes committed by the same perpetrator. The court noted that it was undenied by the defendants that it is normal practice in forensic pathology to review similar crimes by the same perpetrator and that textbooks and other scholarly works endorse this practice. The court concluded that the doctor could testify at trial that there is evidence the victim was gagged or pressure was applied to her mouth, but not that the mouth pressure applied was intended to prevent her from calling out for help and was sufficient for that purpose only. The court concluded that the latter opinion was not based on scientific method or study and was outside of the doctor's area of expertise.

D. Credibility Issues

Klein v. Vanek, 86 F.Supp.2d 812 (N.D.Ill. 2000)(excluding psychiatrist's proposed testimony about plaintiff's propensity to lie).

The court concluded that testimony bearing on a party's or witness's truthfulness is not per se inadmissible. It noted that in *United States v. Hall*, 93 F.3d 1337 (7th Cir.1996), the court had held that testimony that a criminal defendant suffered from a psychiatric disorder that causes people to make false confessions and was susceptible to interrogation techniques that would lead him to make unreliable statements was admissible under Rule 702. The *Hall* court had discussed approvingly the First Circuit's decision in *United States v. Shay*, 57 F.3d 126 (1st Cir.1995), in which the court reversed a jury verdict, finding erroneous the trial judge's exclusion of expert testimony that the defendant suffered from an extreme form of "pathological lying," which the defendant had offered to explain that his statement of responsibility for the offense was not reliable.

The court in *Hall* read an earlier 7th Circuit case, *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) ("[c]redibility is not a proper subject for expert testimony") as barring the testimony of the purported expert, an IRS agent, on the grounds that he "offered no special knowledge or skill that would be particularly helpful" in determining whether the defendant was telling the truth. *Hall*, 93 F.3d

at 1343. The court distinguished *Benson* by concluding that in *Hall*, the expert did in fact have specialized knowledge that would be helpful to the jury. *Id.* at 1344-45.

In *Klein* the court concluded:

Hall cannot fairly be read as giving parties free rein to introduce psychiatric evaluations of witness credibility. This Court believes that it would undermine public confidence in our legal system and seriously diminish the quality of justice were *Hall* read to allow trials to degenerate into swearing contests between opposing psychiatrists claiming to have insight into whether a particular person is telling the truth. A court must carefully evaluate testimony of this type to ensure that it is truly based in science and does not simply tell jurors nothing more than what they already know as a matter of common sense and everyday experience. However, if a party or witness has a psychiatric condition that competent psychiatric testimony and established and peer-reviewed research indicates does have a bearing upon his or her truth-telling ability in some relevant way, *Hall* and *Daubert* tell us that such testimony may be admissible under Rule 702, subject to the limitations imposed by Rule 403 and the other rules of evidence. (817-818)

The court concluded that defendant had failed to show that the doctor's claims were scientifically valid or that his testimony would be relevant or helpful to the jury. There was no support from medical or scientific literature for the proposition that having bipolar disorder or personality disorder with narcissistic and paranoid features makes a person more likely to fabricate, and the expert essentially disavowed that he was making such a claim. The court found there was insufficient evidence to conclude that the expert's opinion met *Daubert's* threshold requirement of scientific validity. In addition, the court found that the expert testimony would be unfairly prejudicial to plaintiff in that it would focus the jury on the details of his psychiatric condition.

United States v. Hankey, 2000 WL 192965 (9th Cir. 2000). Police officer expert on gangs, including the gang involved in the case, allowed to testify about the code of silence among gang members. Court cites *United States v. Abel*, 469 U.S. 45, 52 (1984). Most experts agree that police departments across the country suffer from a code of silence, pursuant to which officers will not testify against other officers. Query – would an expert on the police code of silence have to be familiar with the particular department involved in the case?

V. Liability Issues – Housing Cases

Metropolitan St. Louis Equal Housing Opportunity Council v. Gordon A. Gundaker Real Estate Co., Inc., 2001 WL 135430 (E.D.Mo. 2001). This was an action by the city's housing agency and others against a real estate agency alleging

discriminatory housing practices, including “steering.” The court held a *Daubert* hearing in connection with several experts proposed by the plaintiffs and defendant.

The action was based on the use of black and white testers employed by the housing agency to seek housing. The defendant argued that the testing data was the result of an unreliable and scientifically invalid testing methodology; and secondly that the methodology employed by plaintiffs’ experts to analyze the tester evidence failed to meet a proper standard of reliability. The court ruled that although there had been few challenges to behavioral and social science evidence under *Daubert*, that reliability principles had to be observed with respect to such evidence when it was the primary support of a theory of liability.

The court concluded that the testing protocol of the tests employed in this case was seriously flawed and lacked any reasonable indicia of reliability. The court made the following criticisms:

Neither [coordinator of the tests] had an extensive background in fair housing matters, in particular fair housing testing. Neither were (sic) especially familiar with the HUD audit studies nor with the case of *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983), aff’d in part, rev’d in part 774 F.2d 135 (6th Cir. 1985). Neither used the testing protocol established in the HUD studies or modified in Hilltop as a standard for developing their testing protocols. There was ambiguity in the test instructions as to the target housing area; some forms targeted the ‘City of Florissant’, while others targeted the ‘Florissant area.’ Some test forms contained an initial ‘telephone contact form,’ others did not. Some test forms contained a debriefing form to be completed by the Test Coordinator, some did not.

More worrisome was the inconsistencies (sic) in the execution of the tests. Several of the testers failed to follow the fabricated script; i.e. significantly altering their personal background, the reason for contacting the agent, changing the type of house sought. Some failed to complete the test form or left parts blank. The testers differed as to their response to follow-up calls by the agents; some viewed additional homes, some did not. On some test forms, the number of homes shown were not the same for both testers of a ‘couple’ team. In the 1996 tests, one agency was audited by repeated contact with the same agent (who happened to be the owner) while the other agencies were audited by repeated contact with different agents. The debriefing of testers varied greatly. Especially in 1997, there was little or no consistency in the timing or method of debriefing. In fact, at least one tester was never debriefed. (op., 6-7, footnotes omitted.)

The court rejected the plaintiffs’ proposed distinction between “research based testing” and “enforcement based testing.”

The court found that the plaintiffs failed to articulate a set of standards which govern the validity and reliability of fair housing tests. It concluded:

There simply was no standardized protocol utilized in the design and execution of the EHOC tests. The Court is not dismissing the fact that tester evidence is probably the best means by which to demonstrate fair housing violations. However, the production of such evidence must be done under some set of standards which assure a reasonable level of validity and reliability. In this case, the EHOC failed to utilize standards available to it in designing and executing the tests; i.e., HUD standards, the standards set out in Hilltop, or even generally recognized social science standards. (op., 8).

The court also rejected the testimony of the plaintiff's expert, the Executive Director of the National Fair Housing Alliance, that the race of a speaker can be identified over the telephone. The court noted that the expert was not a linguist nor trained in voice analysis, had not published anything about voice identification and was unfamiliar with local dialects. The court rejected a published article relied upon by the expert to demonstrate the reliability of racial voice identification as "not supported by the Federal Rules of Evidence." The court rejected the same expert's proposed criticism of the defense experts' analysis of the data in the case, because she was not a social scientist or statistician.

The court also rejected testimony from a second expert for the plaintiffs, the Executive Director of the Fair Housing Center in Detroit. He had been using testers in similar cases for thirty years. The court rejected his opinions on "enforcement testing" because he had no formal degrees in social science, was not a statistician or a lawyer, his theory on fair housing testing had not been subject to any peer review or publication, its known potential rate of error had not been tested, it had not been shown to be generally accepted as reliable by the relevant social science community and the witness did not claim to be an expert in fair housing testing.

The court did find that the defense experts' analytical methodologies for evaluating the design, execution and data derived from the plaintiffs' tests were scientifically valid and reliable. One of the defense experts had a Ph.D. in sociology and had supervised hundreds of research projects involving research design. He had over thirty-five years experience in social science research. The other had doctorate degrees in psychology and mathematical/statistical psychology and had been involved in behavioral sciences data analysis for thirty-five years, working primarily in field research and statistical analysis.

Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996). The district court had excluded testimony by two experts proffered by the plaintiffs. The experts were a professor of sociology at the University of Chicago, who would have testified about the history and patterns of housing discrimination in Chicago, a psychologist, statistician, and chair of the Department of Marketing Communication at Columbia College (Chicago), who would have testified about how advertising sends a message to its target market and how an all-white advertising campaign affects African-Americans. On appeal the court held that the district judge had not properly applied the *Daubert* factors.

The court described the methodology that is appropriate in social science cases. A trial judge must first consider whether the proffer demonstrated that the work that the scientific expert has done meets the standards of intellectual rigor that would be demanded in his professional work, using criteria like those described in *Daubert* for guidance. Next, it must determine whether the proffered testimony is based upon the expert's special skills. Finally, the court must decide whether the proffered testimony will assist the trier of fact to understand or determine a fact in issue. The court noted that "social scientists in particular may be able to show that commonly accepted explanations for behavior are, when studied more closely, inaccurate." It held that the court below had erred insofar as it assumed that only evidence completely inaccessible to the jury would be admissible under Rule 702.

The court held that testimony had been improperly excluded which would have explained the way an advertising campaign sends a message to its target market and how an all-white campaign affects African-Americans. The court held that the testimony would have given the jury a view of the evidence well beyond their everyday experience. The court held that both the materials on which the expert relied, which were peer-reviewed articles accepted in his profession, and the particular methodology he used (including the "focus group" method), were appropriate for expert scientific testimony.

With respect to expert testimony about the history and patterns of housing discrimination in Chicago, the court held that the trial judge had the power to consider under Rule 403 whether the evidence should have been excluded because its relevance was too slim, in light of potential prejudice, to warrant its admission. The court suggested it may have drifted too far from the advertising campaign at issue in the case. Nevertheless, the court held that the district court erred in failing to use a *Daubert* framework in assessing this testimony, and remanded for the trial court to consider a new proffer of this testimony, in light of its relevance to the issues to be tried and the evidence offered by the defendants.

VI. Damages Issues

A. Causation

Regalado v. City of Chicago, 40 F.Supp.2d 1009 (N.D.Ill. 1999)(neurologist was not barred from testifying as to causation of injuries in civil rights action arising from officer's alleged use of excessive force; reasonable jurors could determine from neurologist's testimony that plaintiff's stroke resulted from a trauma like the one inflicted by officer and that plaintiff had experienced no other such trauma, leading to the reasonable inference that his injuries were more likely than not to have been caused by officer's actions).

Based on a neurologic examination, CAT scans and an arteriogram test, the expert concluded that plaintiff had suffered a brainstem stroke. The doctor ruled out other potential causes for such a stroke based on medical history. The

doctor then testified that to a reasonable degree of medical certainty he had narrowed the field down to only one possible cause--vertebral artery dissection caused by trauma. The expert's opinion was that the dissection occurred after a trauma "that basically caused motion of the head in relationship to the trunk that put sufficient stress or tension on one or both vertebral arteries." (1019)

The doctor could not testify to what trauma in particular caused the vertebral artery dissection. But he did testify to a reasonable degree of medical certainty that a strike or strikes to the head (such as the blows administered by the defendant) could have caused the injury.

The court concluded that the jury could consider plaintiff's activities in the days leading up to his stroke and determine whether any such other possible incidents actually occurred, thus enabling it to reach a reasoned decision as to whether plaintiff had sustained his burden of proving that the defendant's actions proximately caused his injuries.

The court rejected the defendants' contention that the doctor's testimony had not been subjected to the scientific method. The court stated that the expert's inability to specify exactly what trauma caused the stroke did not render the rest of his testimony either "subjective belief or unsupported speculation." (1020) The court concluded, on the other hand, that to bar such testimony would invite "unanchored speculation" on the part of a lay jury. (1020, n. 16)

Tofano v. Reidel, 61 F.Supp.2d 289 (D.N.J. 1999)(denying motion to exclude testimony of medical examiner on the ground that it was based only upon examination of decedent's body, as opposed to consulting other sources of information relied upon by forensic pathologists).

After his examination of decedent's body, the pathologist concluded that traumatic findings associated with asphyxiation such as "petechial hemorrhages in conjunctivae of eyes (small pin point hemorrhages in inner lining of eyelids), contusion of [the] mucosa of lip (bruise of inner lining of lip due to compression against the teeth), abrasion of skin of neck (scratch due to pressure on the neck), [and] hemorrhages of internal structure of the neck[.]" led him to conclude that Tofano "died as a result of compression [sic] to his mouth and neck." (295) He further opined that "[t]hree officers on his back while he was on prone position contributed to his asphyxial death." (295)

The defendants argued that the doctor's opinion was unreliable. They argued that his opinion was "result-oriented rather than based upon the facts" because he did not follow proper forensic pathology protocol, including investigating the scene, reviewing police reports, or interviewing the victim's wife. (296) The pathologist based his conclusions only on a viewing of the body itself. Defendants also contended that he failed to adequately consider the possibility that decedent died solely due to a cocaine overdose.

The court relied upon Third Circuit language to assess reliability:

The reliability requirement ... should not be applied too strictly. Helpfulness to the trier of fact remains the ultimate touchstone of admissibility. If the expert has 'good grounds' for the testimony, the scientific evidence is deemed sufficiently reliable. A determination that the expert has good grounds assures that the expert's opinions are based on science rather than 'subjective belief or unsupported speculation.' *Holbrook*, 80 F.3d at 784 (citing to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

The doctor had performed what no one disputed was a standard autopsy. Although he did not investigate the scene or conduct interviews, his conclusions were primarily based upon the physical evidence. In addition, although he concluded that decedent died as a result of compression to his mouth and neck, he did acknowledge the toxic level of cocaine in his blood and urine.

The court concluded that the defense arguments went to the weight that should be afforded to the expert's opinion, not to whether it should be excluded altogether.

Johnson v. City of Cincinnati, 39 F.Supp. 2d 1013 (S.D. Ohio 1999). In a positional asphyxia case, the court notes there is a "battle of experts," but finds the opinions reliable under *Daubert*.

Watkins v. Schriver, 52 F.3d 769 (8th Cir. 1995)(neurologist was properly prohibited from testifying that detainee's injury was more consistent with being thrown into wall than with slip and fall).

Plaintiff, a quadriplegic as a result of the incident, sought recovery for the injuries he received while in the city drunk tank. The doctor had testified that the injuries sustained by plaintiff in the jail cell were the result of a blow to the top or back of the head that required a substantial amount of force. The court affirmed the decision of the district court not to allow the doctor to testify that the nature of the blow was such that it was more likely caused by being thrown into the wall than a slip and fall.

The court concluded that plaintiff had failed to explain adequately how expertise as a neurologist enabled the doctor to testify that the injury was more consistent with being thrown into a wall than with a stumble into the corner. The doctor was not certified at trial as an expert in either accident reconstruction or forensic medicine. Further, he had admitted that he had warned plaintiff that he could be paralyzed from a slip and fall when he had earlier advised him to undergo surgery to correct a pre-existing problem.

Rodriguez Cirilo v. Garcia, 908 F.Supp. 85 (D.P.R. 1995)(excluding clinical psychologist's testimony that attack would have been prevented if officers had detained assailant two weeks earlier).

Plaintiffs alleged that defendants' failure to detain the assailant on an earlier occasion caused the stabbing of Cirilo three weeks later. Plaintiffs submitted a declaration a clinical psychologist, who stated that based on his examinations of plaintiffs, it was his opinion that the assailant had a serious personality disorder and that this disorder "played a causative role" in the stabbing. He further opined that if the assailant had been detained, he would have received effective treatment and the attack would have been prevented. The expert evidently did not examine the assailant or his medical records. It appeared that the opinion on the causation of the stabbing was based entirely on interviews with plaintiffs. The court found that the opinion did not rest on a reliable foundation.

B. Economists

Diminution of Earning Capacity

Schieber v. City of Philadelphia, 2000 WL 1843246 (E.D.Pa. 2000)(proposed expert testimony on the lost future earnings of decedent).

Defendants argued that plaintiff's expert lacked expertise in the field of vocational profiling. The court found that the questions was whether he was qualified to render an opinion as a mathematical expert, not whether he was qualified to divine decedent's professional opportunities had she lived. The court concluded that the expert's educational and professional background qualified him to testify to decedent's lost future earnings.

The opinion discusses at some length the "LPE technique" for calculating work-life expectancy. The "L" stands for life, "P," for the probability that if the subject is living she will either be working or actively looking for work and "E" stands for employment. The expert computes the combined probability that all three things exist, i.e., the joint probability LPE is the chance that an average person would actually have been alive, trying to find a job, and in fact, employed. The expert also used government work-life tables, issued by the Bureau of Labor Statistics of the Department of Labor.

The expert also calculated fringe benefits and deductions for personal consumption. The expert used data from the Bureau of Labor Statistics as well as a basic fringe benefit package, including health insurance, life insurance, Social Security and a retirement savings plan. The expert employed a government database for consumption expenditures of single people in the highest income bracket. Personal expenditures were deducted from projected income, and this number was also increased by 3.1% per year to account for increases in

productivity. The court noted that this method of calculating damages is mentioned in two treatises concerning the calculation of economic damages. Brookshire & Smith, *Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys* (1990) and Martin & Vavoulis, *Determining Economic Damages* (2000).

The court also discussed at length the methodology of the expert in determining the salary that the decedent would have been able to earn. To the extent the expert's opinion was based on educational achievements of decedent, government statistics and other objective criteria, the court found them reliable. To the extent the expert's analysis was based on anecdotal evidence from selected persons who knew decedent whom he interviewed, the court found the conclusions unreliable.

Hedonic Damages

Ayers v. Robinson, 887 F.Supp. 1049 (N.D.Ill. 1995) (expert testimony regarding hedonic damages, the value of an individual's "whole life," held inadmissible).

The court criticized the texts relied upon by the expert and the methodology employed. The expert had begun the calculations with a benchmark figure that purportedly represents the value of a statistical human life as determined through willingness-to-pay to avoid disasters methodology. The court noted that a serious criticism of the willingness-to-pay model is that people are poor perceivers of risk and concluded that this critique goes to the heart of the theory and threatens to undermine almost all of the empirical research. The court criticized other methodology employed by the expert as having made whatever adjustments were necessary to bring the raw data within a target range.

Moreover, the court found that the willingness-to-pay model estimates the value of a statistical life--a nameless, faceless member of society. The court concluded that such a process reveals a lack of "fit" under *Daubert* because the willingness- to-pay data goes to one thing (value of a statistical life) while the jury is called upon to determine a potentially very different figure (value of a particular person's life).

As to the basic assumption underlying the economic model--that the amount of individuals' willingness-to-pay for small reductions in the likelihood of death reflects how society values life, the court identified these concerns: (1) the assumption that people have freedom of choice in deciding to confront risk, (2) the assumption that people perceive risk accurately, (3) the non-monetary factors that drive many consumer purchases (e.g., advertising) and employment decisions (e.g., civic pride), and (4) the political aspects of government regulation (e.g., budgets, lobbyists). The court concluded that those considerations "go a long

way toward undermining the basic premise behind the willingness-to-pay model.”

VI. Court-appointed Experts

Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995)(district courts lack authority to appoint expert witnesses to assist plaintiffs proceeding under in forma pauperis statute, and affidavit submitted by witness who was allegedly addicted to heroin for 30 years was not admissible as "lay opinion" or "expert opinion").

The court considered whether expert witnesses can be appointed to assist a plaintiff proceeding under the in forma pauperis ("IFP") statute, 28 U.S.C. § 1915. Noting that the Supreme Court has held that “expenditure of public funds [on behalf of an indigent litigant] is proper only when authorized by Congress,” *United States v. MacCollom*, 426 U.S. 317, 321, (1976), the court concluded that the plain language of § 1915 does not provide for the appointment of expert witnesses to aid an indigent litigant. See also, *Boring v. Kozakiewicz*, 833 F.2d 468 (3d Cir.1987), cert. denied, 485 U.S. 991 (1988).

The court did note that in appropriate circumstances a court might appoint an expert under Fed.R.Evid. 706. The rule provides that compensation of the expert is by the parties “in such proportion and at such time as the court directs.” Some courts have allowed appointment even when one party was indigent and unable to bear a portion of the costs. See *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir.), vacated and remanded on other grounds, 502 U.S. 903, 112 S.Ct. 291, 116 L.Ed.2d 236 (1991); *Webster v. Sowders*, 846 F.2d 1032, 1038-39 (6th Cir.1988). The court found Rule 706 inapplicable in *Pedraza* because plaintiff had not requested it and had made an insufficient showing of the need for such an expert.

VII. Additional Resources

Adroque and Ratliff, “Kicking The Tires After Kumho: The Bottom Line On Admitting Financial Expert Testimony,” 37 HOULR 431 (Summer, 2000).

Goodman, “Use Of Expert Witnesses In Sexual Harassment Cases,” 630 PLI/Lit 425 (June, 2000) (PLI Order No. H0-006Y).

Black, 17 “The Use (Or Abuse) Of Expert Witnesses In Post-Daubert Employment Litigation,” HOFLELJ 269 (Spring, 2000).

Ellis and Ross, “The Admissibility Of Expert Opinion Testimony About Human Resources Practices, Sexual Stereotyping And Sexual Behavior In The Workplace,” SE05 ALI-ABA 703 (July, 1999).

Shestowsky, Note, “Where Is The Common Knowledge? Empirical Support For Requiring Expert Testimony In Sexual Harassment Trials,” 51 STNLR 357 (Jan., 1999).

Shah, Comment, "Limiting Expert Testimony About Sexual Harassment Policies," 1999 U. Chi. Legal F. 587.

Jansonius and Gould, "Expert Witnesses In Employment Litigation: The Role Of Reliability In Assessing Admissibility," 50 Baylor LR 267 (Spring, 1998).

Blend, "Using Expert Witnesses In Employment Litigation," 17 Rev of Lit 27 (Winter, 1998).