Admissible Testimony and Clinical Judgment

The Development and the Resources Needed to Support and Sustain Opinions in Forensic Rehabilitation

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Timothy F. Field, Ph.D.

Elliott & Fitzpatrick, Inc.

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by

Timothy F. Field, Ph.D.

Distributed by:

E & F, Inc.
1135 Cedar Shoals Drive
Athens, GA 30605
800.843.4977
www.elliottfitzpatrick.com

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Timothy F. Field, Anthony J. Choppa & Roger O. Weed

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Introduction

Daubert v. Merrell Dow Pharmaceuticals (1993) launched a protracted discussion and debate on what constitutes admissible testimony in federal and state courts for the forensic rehabilitation professional. The Daubert case involved a ruling on the admissibility of a science issue – did the drug Bendectin cause the deformity in Jason Daubert (and other plaintiffs) following the ingestion of the drug during his mother's pregnancy. The Supreme Court ruling decided that the plaintiff's case was not valid since the presentation of scientific data was flawed, and generally did not meet the minimal standards of the scientific method. The early impression by Feldbaum (1997), and others (see discussion in Field, 2006) seemed to suggest that the admissibility of all testimony would also fall under the umbrella of the new Daubert standards, including rehabilitation testimony (Stein, 2002). The test of time has shown that the all-inclusion premise that Daubert is the final determinate of admissibility (with the four basic criteria for admissibility) has not been sustainable or supported for a variety of reasons.

In addition to the discussion in Field (2006), several factors are relevant in understanding the current parameters of admissible testimony for the forensic rehabilitation consultant.

1. Subsequent Rulings

Daubert has been clarified and moderated by the Paoli (1994), Joiner (1997) and Kumho (1999) rulings , all of which emphasis, as the Daubert ruling did, that the four factors (scientific method, standard error rate, generally accepted, and peer reviewed) were not meant to be all-inclusive, and that other factor may apply. The Supreme Court never intended for the rules (factors) to be all inclusion and, in fact, relied heavily upon the Federal Rule 702 for the foundation of the Daubert rulings.

2. Federal Rule 702

Federal Rule of Evidence 702 is the primary governing influence on admissibility issues - not Daubert. The Supreme Court rulings of Daubert, Joiner, and Kumho are intended to interpret and provide guidance for the gatekeeper. Rule 702 is widely consider to be the most important rule with respect to admissibility:

Rule 702. Testimony by Experts

1. 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.

3. Daubert, Frye, or State Guidelines for Admissibility

The FRE 702 is the prevailing rule whether a case in being adjudicated in a "Daubert" court, and a "Frye" court, or a court governed by State rules. An excellent source of information (Table 1) on this issue is the court cases identifying the rule on a state-by-state survey - a chart displaying which states are governed by the Daubert or Frye standards (Sutherland, 2009). For example, for admissibility, Connecticut relies on Daubert (not Frye), Colorado relies on FRE 702, Indiana has noted that "Daubert is proper, but the judge is not bound by them," Mississippi and Ohio applies Daubert, while some states abide largely by their own rules (Kansas, Nevada, & Wisconsin). For a quick summary on a state-by-state basis, see Table 2. It should be apparent that Daubert applies to federal cases as modified by Kumho Tire (more latitude in admissibility). Also, in state courts, the admissibility is roughly divided between Daubert and Frye on issues of admissibility.

4. Related Court Cases on Admissibility

Since Daubert, thousands of cases have been adjudicated that have included issues related to admissibility of expert testimony, many cases have been challenged from all areas of subjects and content, including the social sciences. A documented case in the field of rehabilitation consulting describes a typical process of an *in limine* Daubert challenge (Choppa, Field & Johnson, 2005). A review of some earlier cases has be completed and presented in earlier publications (Field & Choppa, 2005; Field 2006; and Field et al., 2006).

5. Where's the Evidence (on Daubert)?

The real absence of testimony by forensic rehabilitation professionals being challenged *and* denied by the courts simply doesn't exist in any significant numbers. It may be common practice by some defense firms to routinely challenge VE testimony but usually very few challenges are successful (except in areas of obvious mistakes on the part of the VE).

A Review of Recent Cases

The following is a review and summary of selected cases that have been published by either a federal or state court. Not all cases reviewed involve the work of a rehabilitation consultant, but issues are identified that are potentially germane to the rehabilitation profession. Keep in mind while reviewing these few cases that the Daubert, or Frye, or State rules will differ; take a look (Tables 1 or 2) as to which rules may apply in each case. Cases are discussed by a topical area.

"Judgment Call"

Sometimes one hears of an expert relying on their experience and training (as suggested by the Florida Rules) as the basis for their opinion. In *Garland v. Rossknecht* (2001), an economist (not a rehabilitation consultant) presented testimony on reduced earning capacity. Garland, the plaintiff, was injured in an automobile accident resulting in a neck injury with persistent headaches. Garland's chiropractor concluded that Garland suffered a seven percent loss of whole body functioning. The economist concluded that Garland had a "ten percent disability or earning capacity reduction." The opinion was based "solely on information conveyed from Garland" (there was no VE involved in the case); When pressed on how he arrived at his opinion, the economists stated, "it was a judgment call." While the economist admitted that he had no expertise in "converting impairment ratings into physical vocational limitations," the Circuit Court "nevertheless allowed [economist] to testify without limitation." It was interesting to note that the economist did concede that "a vocational expert has competence that I do not have to take physical limitations and translate them into vocational limitations."

The South Dakota Supreme Court reversed in part and remanded for a new trial based on the conclusion that the Circuit Court abused its discretion in allowing the economist's opinion on Garland's percentage of disability. The Circuit Court noted that the objections by the defense regarding the economist's opinion which went to the credibility of the testimony, not admissibility, a decision that the court ruled that the jury could decide the credibility issue. The Supreme Court's rationale included this assessment: "when dealing with expert opinion, the court must fulfill a gatekeeping function, ensuring that the opinion meets the prerequisites of relevance and reliability before admission." With respect to the "judgment call" issue, the court addressed this directly by dealing with the gatekeeper function of admissibility, and did not necessarily rule that the expert's judgment and opinion was wrong. Rather, the expert was testifying outside his area of expertise and with no foundation (a VE's analysis on vocational functioning).

The issues in this case are: proper expertise and foundation information; abuse of discretion (*General Electric v. Joiner*); and "judgment call."

Expert Bias

Expert bias has everything to do with the impartial and objective opinion of the expert. The

Federal Rules of Civil Procedure (Rule 26.a.2.B) states:

> *(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, 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 any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.*

Several citations (noted above) address the issue of expert bias. In *Lichtor v. Clark*, discovery was directed at the issue of an expert deriving a large portion of his income from a particular party or referral source. The court had the discretion to allow testimony as to the annual amount the expert derived from testimony activities and the amount received, and can be viewed as going to the credibility of the expert.

In *Buck v. Chin* (a Florida Dist Court of Appeal case), under Florida Rules the discovery of an expert witness at trial may include:

1. *The scope of employment in the pending case and the compensation for such service.*
2. *The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.*
3. *The identity of other cases within a reasonable period of time in which the expert has testified by deposition or trial.*
4. *An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness.*

In this case, the expert, a physician, derived about two-thirds of his practice from one liability insurer, and over one million dollars from a single defense source. The court observed that "this fact alone should be sufficient to allow the plaintiff to argue that [expert] might be more likely to testify favorably on behalf of one side rather than the other." A similar case (*Elkins v. Syken,* 1996) discusses in more detail the elements of the examination of expert who appear to testify with bias. In *B.F. Specialty v. Charles M. Shedd*, the WV Appeals Court noted that "a trial judge has broad discretion in the control and management of discovery . . . And that an abuse of discretion [occurs] when its ruling on discovery motions are clearly against the logic of the circumstances then before the court, and are so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration." Finally, in *Trower v. Jones*, The Supreme Court of Illinois held that

(1) it was proper to inquire how much plaintiff's medical expert witness was earning annually from services related to rendering expert testimony, and it was proper to inquire into such income for the two years immediately preceding trials, and (2) inquiry into the frequency with which Plaintiff's medical expert witness testified for plaintiffs was permissible.

In *Noffke v. Perez*, the plaintiff's expert was requested to turn over personal income tax records in order to explore the possibility of a bias on the part of the expert. The Supreme Court of Alaska ruled that the lower court did not abuse its discretion in ordering the records, especially since the disclosure would not be public, but within the confidentially of the court. The plaintiff was fined $900.00 by the lower court for failing to turn over the tax records in a timely manner; the higher court did not reverse this ruling as the ruling was also within the discretion of the court.

For the vocational expert, these rulings should bring some awareness of the need to balance one's practice between plaintiff and defense work which should alleviate any concern regarding the amount of income and primary source of consulting referrals.

Scope of VE Practice

In *Smith & Smith v. M.V. Woods Construction*, the vocational expert was not qualified to offer opinions in areas in which he testified. The court set aside "the verdict with respect to damages for past and future loss of earnings, past and future loss of household services, and future medical expenses" for the plaintiff who sustained a back injury while tossing concrete blocks at a construction site. The court ruled that the lower court "abused its discretion in allowing plaintiff's expert to testify concerning those elements of damages. "Nothing in the record suggest that [VE's] area of expertise includes assessing the damages", and resulted "in a lack of proper foundation for the expert's opinion." The Court quoted from *Daum v. Auburn Memorial. Hospital* that "an expert witness must possess the requisite skill, training, knowledge and experience to ensure that an opinion rendered is reliable."

The vocational expert needs to understand the parameters of his or her areas of expertise and be careful to offer testimony only in those areas. Even if an attorney requests an opinion outside of one's perceived area of expertise, one should proceed with due caution.

Admissibility of Testimony Under Daubert

Reference again to Table 2 will clearing indicate that this world of presenting expert testimony is not governed exclusively by the Daubert ruling; approximately one half of the states are governed by Frye, their respective state rules, and some combination of all three. This is made very clear in *Epp v. Lauby* (a Nebraska state leaning toward Daubert) where the court observed: "So long as the expert's opinion is based on reliable methodology, his or her opinion is admissible, whether or not the court agrees with the expert's opinion." The court added that "the Daubert test does not

stand for the proposition that scientific knowledge must be absolute or irrefutable. It would be reasonable to conclude that the subject of scientific testimony must be known to a certainty; arguably, there are no certainties in science."

Loss of Labor Market Access *equals* Loss of Earning Capacity?

In *Eastman v. The Stanley Works et al.* The vocational expert testified that the "appellee's injury renders him incapable of performing 80 to 85 percent of jobs for which he was qualified prior to his injury." The issue has to do with the expert failing to indicate wether or not the lost access to jobs would pay the say or more of the job currently held. The court observed that "only if the loss of those job opportunities quantifiably reduced the amount which (appellee) was capable of earning before his injury will he have proven with reasonable certainty that he has suffered future economic loss.' Testimony was disallowed.

Earnings Capacity v. Actual Earnings

In *Boland-Maloney Lumber Company v. Burnett & Burnett*, an economic expert's testimony was challenged by the plaintiff because the expert failed to use the plaintiff's actual career at the time of injury to calculate a loss of earning capacity, but instead used a "proxy,' such as the titles of construction supervisor and construction manager. The expert, who had worked in the field of vocational counseling and rehabilitation since 1965, "based his testimony on the interview with the plaintiff, information on the [plaintiff's] employment and work history, and upon the nature of the [plaintiff's] injuries." The expert argued that the worker's actual earnings were not indicative of the worker's earning power. The court ruled:

> *Although [expert's] testimony was not based on [plaintiff's] actual earnings at the time of injury, nothing precludes testimony by a vocational expert on the impairment of a plaintiff's power to earn money, or the use of a 'proxy' to do so where current earnings are not indicative of the plaintiff's earning power. The trial court did not abuse its discretion.*

This case is important because it allows for the correct and creative approach to assessing vocational capacity and not just mere performance, i.e. a person not performing to their level of capacity.

A Restitution Case

In *United States of America v. Pearson*, the defendant was found guilty of crimes against two persons, and further agreed to pay restitution of $100,000.00 to the government to be divided equally between the two victims. A vocational expert, for the plaintiff, evaluated the two victims and determined that each victim should receive $912,976.00 for the estimated future costs of medical care, treatment and services. The appeals court disallowed the expert's recommendation of $912,976 and remanded the case for a more precise explanation of the estimation of future

medical costs for the victims. The court also observed that the victims had "some problems before and that it was difficult to quantify or pinpoint the etiology of the victims' mental health issues that required on-going treatment." In other words, pre-existing conditions may have been present with the victims of the crime.

An Attorney in the Room

In Selve Muse-Freeman v. Imran Bhatti involved the issue of a life care planner for the defense who objected to the presence of the plaintiff's attorney being present during her interview and evaluation. The court ruled that, pursuant to Federal Rule of Civil Procedure 26(c)(1)(E), that the life care planner could complete the evaluation without the presence of the plaintiff's attorney. The Rule reads:

> *A court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following . . . . (E) designating the persons who may be present while the discovery is conducted.*

This case was published in the *Journal of Life Care Planning* (2009), along with a comment by the expert (Koslow, 2009).

Last Minute Research

In *Stevens v. Bangor and Aroostook Railroad Company*, a vocational expert was allowed to testify after being challenged for a lack of factual basis of her testimony. The court ruled that a trial court "has wide discretion in determining the admissibility of expert testimony." The VE's "vocational report was based on her review of the plaintiff's medical records and prior work experience, a meeting with the plaintiff during which they discussed his skills and relied upon [methods] typically used by persons in her field." Regarding the last minute research and a lack of notice to the railroad, the court ruled that this was "a management issue at the discretion of the trial court." The trial court offered to instruct the jury to ignore any information the expert acquired after discovery, but the defense didn't take the court up on the offer. There was no abuse of discretion.

As a note of caution, experts need to be cautious when asked to include "after discovery" information; generally this is not allowable unless agreed to by all parties (plaintiff, defense, and the court).

Unusual Cases

ADA on a Case-by-Case Basis

PGA Tour, Inc. v. Casey Martin * (see Note), while not directly a vocational issue or involving a

vocational expert, the case is instructive about the proper application of disability legislation - the *American with Disability Act* (ADA). Casey was born with a degenerative circulatory disorder (Klippel-Trenauney-Weber syndrome) which obstructs the blood flow to his legs. From being a teammate of Woods at Stanford University to moving to the PGA Tour, Casey's right leg became progressively worse with severe pain and fatigue. There was also the potential of hemorrhaging, blood clots and eventual amputation. Casey petitioned the PGA for a use of a cart so that he could continue playing; the issue, according to the PGA, was that a cart would appreciably change the nature of the competition. "The Court ruled that the PGA Tour was a place of public accommodation under the ADA, and that providing a cart would not fundamentally alter the nature of the event because the fundamental nature of golf is shot-making" (Goren, 2002). This case illustrates a different, but important, case that could have drawn upon the knowledge and skills of a rehabilitation consultant.

A Life Care Plan (damages for the non-injured)

Osorio, St of NY Workers'Comp Bd is case involving a vocational expert in a very unusual manner. Jane Doe, who worked in the World Trade Center (Tower 1) on the 83rd floor; Jane Doe died on 9/11/2001. The interesting aspect of this case involved a child (John), age 10 who was a member of the family that was largely supported by the income generated by his half-sister, Jane Doe. John had significantly donated to the personal care and emotional support of Jane who possessed issues related to autism. The VE crafted a life care plan for John which became part of the case development that was eventually presented to the NY WC Board. Long term support was provided for John.

Expert Cannot Cite a Source

Ollis v. Knecht involved the testimony of an expert on the issue of loss of income of a person who had died in an automobile accident. The primary issue was the abuse of discretion by the trial court for denying the opportunity of the expert to testify. The expert was unable to provide a citation of a resource that was mentioned as the basis of his rationale - a "mirror image approach." The [expert] "did not provide any citation to authority to support his assertion that the mirror image approach is generally accepted . . . the trial court judge did not have to believe [expert's] bald assertion." The trial court did not abuse its discretion.

Learned Treatises

In *Crane v. Newt Wakeman, M.D.*, Inc. the court ruled that for a learned treatise "to be authoritative, there must be some evidence of general acceptance and accreditation of the text or treatise within the profession. This can be established by the expert himself, the testimony of other experts in the field, or judicial notice." However, "mere familiarity of a witness with a publication or periodical does not render it authoritative (In Grippe v. Momtazee, 1986). Using or relying on "learned treatises" by an expert can open a can of worms during cross-examination. First, for a resource or text to be considered "authoritative" by other experts in the field, or to be

generally accepted, is no simple task. Nothing in the rehabilitation literature to date has addressed this issue. Secondly, it may be more reasonable for an expert to talk about resources that are "highly regarded" or "generally accepted" rather than be referred to as "authoritative" (Weed, R., *Personal communication*, Feb. 15, 2010).

No Specific Facts

In *Doren v. Battle Creek Health System*, the vocational expert stated that the plaintiff's "physical impairments preclude here from engaging in most of the jobs in the local and national economy as a registered nurse" indicating that she had a physical impairment that substantially limited one of her major life activities, including her usual occupation. The court ruled that the VE failed to provide enough specific facts and the testimony was disallowed. *Federal Rule of Civil Procedure* 56(e) states that "a party must offer specific facts showing that there is a genuine issue at trial.

Conclusion

A review of the legal literature would suggest that admissibility issues are smoothing out after a decade of uncertainty following the Daubert decision. Vocational experts need not be threatened by the potential threat of a "Daubert challenge" or of the various state-by-state rules for state courts. However, an expert in areas of the vocational rehabilitation and life care planning need to be credentialed properly, to offer services and testimony within their area of expertise, rely upon reliable foundation information and data, and be clear on selected methodologies that have been generally accepted and peer reviewed. The cases that are reviewed in this booklet should be both instructive and helpful for experts as these and similar cases do offer useful guidelines on the admissibility of testimony.

Table 1: A Fifty State Survey Concerning the Admissibility of Expert Testimony

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With its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court sought to provide guidance to trial judges with respect to whether and under what circumstances scientific evidence should be deemed admissible. In the fifteen years since *Daubert*, state court judges have issued numerous opinions concerning *Daubert* and its progeny, but one thing remains clear: There is no uniformity among the states or even within states. As one North Dakota judge noted in a concurring opinion, local lawyers are "adrift" among the many different amalgamations of admissibility standards. Some states, such as Tennessee, have held that the standard for admissibility is more strict than that set out in *Daubert*, while others, like Wisconsin, have adhered to a much less restrictive standard. Some apply one standard to criminal cases and another to civil cases, as in New Jersey, while still other states (Illinois and Kansas, for example) do not apply any standard at all when the "expert" testifying is the treating physician — even if the witness is testifying as to causation. At least one state, Oregon, holds that any *Daubert* type challenge is waived if not preserved during the expert's deposition. The following survey provides an overview of the standards adopted by each of the states concerning the admissibility of expert testimony.

Alabama: *Slay v. Keller Indus*., Inc., 823 So. 2d 623 (Ala. 2001). Applying *Frye*; refusing to adopt *Daubert*.

Alaska: *Alaska v. Coon*, 974 P.2d 386 (Alaska 1999). *Adopting Daubert but see Macron v. Stromata*, 123 P.3d 992 (Alaska 2005). Rejecting the application of *Daubert* to non-scientific expert testimony; explicit rejection of *Kumho Tire*.

Arizona: *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000). Rejecting *Daubert* and *Kumho Tire* as placing the judge in a position of ruling on weight or credibility as opposed to admissibility; retaining *Frye* and Rule 702 alone.

Arkansas: *Farm Bureau Mut. Ins. Co. of Ark., Inc., v. Foote*, 14 S.W. 3d 512 (Ark. 2000). Adopting Daubert.

California: *People v. Leahy*, 882 P.2d 321 (Cal. 1994). Refusing *Daubert* and retaining the *Kelly-Frye* test — *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

Colorado: *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Noting the judge may consider Daubert, but must issue specific findings on the record as to the helpfulness and reliability factors. CRE 702/evidence rule is the appropriate admissibility standard, not *Frye*.

Connecticut: *State v. Porter*, 241 Conn. 57 (Conn. 1997). Adopting *Daubert* in lieu of *Frye*.

Delaware: *M.G. Bancorporation, Inc*., v. Le Beau, 737 A.2d 513 (Del. 1999). Adopting the analysis of *Daubert* and *Kumho Tire*.

Florida: *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). Adhering to the *Frye* test, but only where the expert opinion is based on new or novel scientific techniques; noting most expert opinion testimony is not subject to Frye, such as an opinion based only on the expert's experience and

training.

Georgia: *Spacht v. Troyer*, 655 S.E. 2d 656 (Ga. App. 2007). Holding that the relevant statute, OCGA § 24-9-67.1, governs expert testimony; subsection (f) allows consideration of *Daubert*.

Hawaii: *State v. Vliet*, 19 P.3d 42 (Hi. 2001). Noting that the touchstones of admissibility for expert testimony are the relevance and reliability factors under Rule 702.

Idaho: *State v. Merwin*, 962 P.2d 1026 (Id. 1998). Noting that Idaho has not expressly adopted *Daubert*, but applying its factors. See also Weeks v. Eastern Idaho Health Servs., 153 P.3d 1180 (Id. 2007). Holding that *Daubert* has not been adopted, but the judge may consider certain factors such as whether the expert's theory has been or may be tested and whether the theory has been subjected to a peer reviewed publication; declining to consider whether the theory is commonly agreed upon or has been generally accepted in the relevant scientific community.

Illinois: *Warstalski v. JSB Const. & Consulting Co.*, 892 N.E. 2d 122 (Ill. App. 2008). Holding that *Frye* applies generally, but it does not apply to medical testimony; noting a treating physician's testimony as to causation is not subject to *Frye*.

Indiana: *Kempf Contracting & Design, Inc., v. Holland-Tucker*, 892 N.E. 2d 672 (Ind. App. 2008). Noting that consideration of the *Daubert* factors is proper, but the judge is not bound by them.

Iowa: *State v. Garcia-Miranda*, 735 N.W. 2d 203 (Iowa App. 2007). Noting that Iowa courts are not required to follow *Daubert* when applying the Iowa Rules of Evidence; judges are encouraged to use *Daubert* only when the expert evidence is novel or complex.

Kansas: *State v. McHenry*, 136 P.3d 964 (Kan. App. 2006). Noting that *Frye* is to be used only when the judge considers the admissibility of opinions based on new or experimental scientific techniques. See also *Kuhn v. Sandoz Pharmaceuticals Corp*., 14 P.3d 1170 (Kan. 2000). Holding that the *Frye* test is not applicable to an expert's "pure opinion" based on that expert's own experience, research, observation.

Kentucky: *Burton v. CSX Transp., Inc*., 2008 WL 4691059 (Ky. 2008). Holding that *Daubert* applies under the relevant Kentucky Rule of Evidence that is similar to FRE 702.

Louisiana: *Cheairs v. State Dept. of Trans. & Development*, 861 So. 2d 536, 542 (La. 2003). Noting that the standards set forth in *Daubert* are controlling.

Maine: *Hall v. Kurz Enterprises*, 2006 WL 1669656 (Me. Super. 2006). Noting that the controlling law is embodied in *State v. Williams*, 388 A.2d 500 (Me. 1978), and is relatively indistinguishable from *Daubert*. See *Searles v. Fleetwood Homes of Penn., Inc*., 878 A.2d 509 (Me. 2005). Noting the same, but specifically declining to adopt *Daubert*.

Maryland: *State v. Baby*, 946 A.2d 463 (Md. 2008). Holding that the admissibility of expert testimony is subject to the application of the *Frye-Reed* test for general acceptance in scientific community. *See Reed v. State*, 391 A.2d 364 (1978).

Massachusetts: *Com v. Powell*, 877 N.E. 2d 589 (Mass. 2007). Noting *Daubert* is adopted, but that a showing of general acceptance in relevant community is sufficient for admissibility regardless of any other *Daubert* factors.

Michigan: *People v. Unger*, 749 N.W. 2d 272 (Mich. App. 2008). Noting that Michigan evidentiary law incorporates *Daubert*.

Minnesota: *State v. Bartylla*, 755 N.W.2d 8 (Minn. 2008). Using the *Frye-Mack* standard of general acceptance for admissibility of novel or emerging scientific evidence, but specifying that the expert's technique must be based on a foundation that is scientifically reliable. *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980).

Mississippi: *Watts v. Radiator Specialty Co.*, 990 So. 2d 143 (Miss. 2005). Applying *Daubert*.

Missouri: *State v. Daniels*, 179 S.W. 3d 273 (Mo. App. 2005). Noting that the criminal courts still follow *Frye*. See *Hawthorne v. Lester E. Cox Medical Centers*, 165 S.W. 3d 587 (Mo. App. 2005). Noting that admissibility of expert opinions in civil cases is governed by statute, § 490.065.

Montana: State v. Price, 171 P. 3d 293 (Mont. 2007). Applying Daubert, but noting that its application is proper only where introduction of novel scientific evidence is sought.

Nebraska: *State v. Schereiner*, 754 N.W. 2d 742 (Neb. 2008). Applying *Daubert* and noting that the trial court acts as a gatekeeper. *See Schafersman v. Agland Coop.*, 631 N.W. 2d 862 (Neb. **2001).**

Nevada: *Hallman v. Eldridge*, 189 P.3d 646 (Nev. 2008). Noting that the statute that governs admissibility is NRS 50.275, which tracks FRE 702; holding Nevada has not adopted *Daubert* yet and wide discretion is vested in the trial court.

New Hampshire: *Baxter v. Temple*, 949 A.2d 167 (N.H. 2008). Holding that *Daubert* applies and that its factors have been incorporated into statute, RSA 516:29-a.

New Jersey: *State v. Groen*, 2008 WL 3067920 (N.J. Super. 2008). Limiting the application of *Frye* to criminal matters. *See Thornton v. Camden County Prosecutor's Office*, 2006 WL 2361816 (N.J. Super 2006). Applying *Daubert* in civil cases.

New Mexico: *State v. Downey*, 2008 WL 4925022 (N.M. 2008). Noting that *Daubert* applies. *See State v. Albesico,* 861 P.2d 192 (N.M. 1993).

New York: *O'Brien v. Citizens, Ins. Co.*, 2008 WL 4754103 (N.Y. Sup. 2008). Holding that *Frye* applies to novel scientific theories or techniques.

North Carolina: *Howerton v. Arai Helmet, Ltd.*, 597 S.E. 2d 674 (N.C. 2004). Holding that North Carolina does not adhere to the *Daubert* standard, but trial judge must instead ask three questions: 1) Is the expert's method of proof sufficiently reliable; 2) Is the witness qualified; and 3) Is the testimony relevant?

North Dakota: *State v. Hernandez*, 707 N.W. 2d 449 (N.D. 2005). Noting that North Dakota never has explicitly adopted *Daubert* or *Kumho Tire*; expert admissibility instead is governed by North Dakota Rule of Evidence 702. The concurrence notes that the state's Rule 702 is identical to FRE 702 and that the Bar is "adrift" between *Frye*, *Daubert*, and 702.

Ohio: *Miller v. Bike Athletic Co.*, 687 N.E. 2d 735 (Oh. 1998). Adopting *Daubert*.

Oklahoma: *Christian v. Gray*, 65 P.3d 591 (Okla. 2003). Holding that *Daubert* applies to civil matters and to all expert testimony, — not just scientific or technical evidence. *See Taylor v.*

State, 889 P.2d 319 (Okla. Crim. App. 1995). Adopting *Daubert*.

Oregon: *Evers v. Roder*, 103 P.3d 680 (Or. App. 2004). Noting that *Daubert* applies, but that any *Daubert* challenge to the expert opinion will be waived if it is not raised during the expert's deposition.

Pennsylvania: *Betz v. Eriee, Ins. Exchange*, 957 A.2d 1244 (Pa. Super 2008). Holding that *Frye* applies only when a party seeks to introduce novel scientific evidence; it is not implicated every time science comes into courtroom. *Com v. Puksar*, 951 A.2d 267 (Pa. 2008).

Rhode Island: DePetrillo v. Dow Chemical Co., 729 A.2d 677, 686 (R.I. 1999). Noting courts may draw guidance from Daubert with respect to the admissibility of all expert testimony even though Daubert has not been expressly adopted.

South Carolina: *State v. Council*, 515 S.E.2d 508 (S.C. 1999). Noting that South Carolina has not adopted *Daubert*, but that the state's evidentiary rule is identical to FRE 702 and sets a "very similar" standard.

South Dakota: *Kostel v. Schwartz*, 756 N.W.2d 363 (S.D. 2008). Adopting the *Daubert* standard.

Tennessee: *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). Adopting factors similar to *Daubert*, but noting that the primary inquiry is whether an expert's opinion testimony will substantially assist the trier of fact and that this inquiry is somewhat stricter than the federal rule. The *Daubert* factors are useful, but Tennessee rules require that courts take a more active role when evaluating expert evidence.

Texas: *Bechtel Corp. v. Citgo Products Pipeline Co.*, 2008 WL 4482688 (Tex. App.

2008). Applying *Daubert* factors. *See E. I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Finding *Daubert* persuasive.

Utah: *Haupt v. Heaps*, 131 P.3d 252 (Utah App. 2005). Noting that the state's Rule 702 applies to the admissibility question unless the expert testimony is novel and scientific. When the testimony concerns novel scientific methods or techniques, then *State v. Rinmasch*, 775 P.2d 388 (Utah 1989), requires a finding of inherent reliability prior to admissibility.

Vermont: *In re Appeal of Jam Golf*, LLC, 2008 WL 3877119 (Vt. 2008). Holding that *Daubert* applies.

Virginia: *Hasson v. Commonwealth*, 2006 WL 1387974 (Va. App. 2006). Noting that Virginia has not adopted *Frye* or *Daubert*, but that the *Daubert* factors are instructive.

Washington: *Lewis v. Simpson Timber Co.*, 2008 WL 1952125 (Wash. App. 2008). Holding that the Frye test is utilized for novel scientific evidence. *See State v. Gregory*, 147 P.3d 1201 (Wash. 2006).

West Virginia: *San Francisco v. Wendy's International, Inc.*, 656 S.E. 2d 485 (W.Va. 2007). Noting that *Daubert* applies, but that when a judge excludes an expert as unreliable under *Daubert*, that decision is reviewed de novo. *See also Witt v. Burackes*, 443 S.E. 2d 196 (W.V. 1993).

Wisconsin: *State v. Swope*, 2008 WL 4923663 (Wis. App. 2008). Noting that Wisconsin

employs a much less restrictive "relevancy test" for the admissibility of expert testimony — not *Frye* or *Daubert*.

Wyoming: *Dean v. State*, 194 P.3d 299 (Wyo. 2008). Noting that *Daubert* and its progeny had been adopted in *Bunting v. Jamison*, 984 P.2d 467 (Wyo. 1999).

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Table 2: A State-by-State Summary on Applying Daubert, Frye, or State Rules

State	Governing Rule	Comment
Alabama	Frye	Refusing to Adopt Daubert
Alaska	Daubert	Rejecting Daubert in non-science cases
Arizona	Frye/702	Rejecting Daubert
Arkansas	Daubert	
California	Kelly/Frye	Refusing Daubert
Colorado	CRE 702	May consider Daubert
Connecticut	Daubert	
Delaware	Daubert	
Florida	Frye	Based of scientific; most opinion based on expert's experience and training.
Georgia	State rules	Allows consideration of Daubert
Hawaii	702	
Idaho	State rules	Daubert factors of testing and peer review; not including general acceptance
Illinois	Frye	But not to medical testimony
Indiana	Daubert	But not bound by factors.
Iowa	State rules	Not required to follow Daubert
Kansas	Frye	Applies to science; not does apply to expert's pure opinion
Kentucky	Daubert	Similar to 792

Louisiana	Daubert	Controlling
Maine	State rules	Daubert/Not Daubert
Maryland	Frye	
Massachusetts	Daubert	Emphasis on general acceptance
Michigan	Daubert	
Minnesota	Frye	Foundation must be reliable
Missouri	Frye	Governed by State statute
Montana	Daubert	Applies to novel scientific evidence
Nebraska	Daubert	Trial court is gatekeeper
New Hampshire	Daubert	Incorporated into State statute
New Jersey	Frye/Daubert	Frye in criminal; Daubert in civil
New Mexico	Daubert	
New York	Frye	
North Carolina	Neither	Three questions: reliable, qualified, relevant
North Dakota	ND 702	Bar is adrift between Frye, Daubert and 702
Ohio	Daubert	
Oklahoma	Daubert	Applies to all testimony - scientific and technical
Oregon	Daubert	But will be waived if not raised during deposition
Pennsylvania	Frye	For novel scientific evidence
Rhode Island	Daubert	Not expressly adopted but applies to all testimony
South Carolina	State	Identical to FRE 702
Tennessee	State	Similar to Daubert rules, but court take a more active role in considering factors for admissibility
Texas	Daubert	
Utah	State 702	Emphasis on reliability
Vermont	Daubert	
Virginia	Neither	But Daubert factors are instructive
Washington	Frye	
West Virginia	Daubert	
Wisconsin	Neither	A much less restrictive “relevancy test”
Wyoming	Daubert	

Summarized from Sutherland (2009)

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***** *Note: I just happen to be a "golf nut" and I followed this case with a great deal of interest. It was disappointment that a few of the bigger names on the PGA Tour were either quiet or not very supportive of Casey Martin playing the Tour with an accommodation (using a golf cart). The Court remedied the situation by finding in Martin's favor. Shame on the PGA Tour for not being pro-active on this issue.*

Appreciation is acknowledged for permission to include the information in Table 1 (exact content) and Table 2 (summary of content) by Ms. Kari Sutherland and ProTe Solutio.

Clinical Judgment

A Working Definition for the Rehabilitation Professional

Timothy F. Field, Anthony J. Choppa and Roger O. Weed

Abstract: *How clinical judgment is used and what the rehabilitation professional understands it to mean is the focus of this article. It is not a "lay" term. It is not intended to mean a glib comment thrown out when an expert has no other basis for opinion. It is a term that has a specific meaning, has been published in peer reviewed journals, and has achieved general acceptance in the field of rehabilitation. The professional meaning of clinical judgment is predicated on valid, reliable and accepted assessment methodologies, instruments and background information about the client concerning the medical aspects of disability by a professional who has specialized knowledge, education, training and/or experience. The authors have observed the term "clinical judgment" utilized in publications, expert reports, depositions, trial testimonies and posts to various list serves. The focus of this article is to make clear that utilization of clinical judgment is appropriate with the assumed understanding of the accepted definition and the specialized knowledge involved in its utilization.*

Background

Since the onset of the Daubert ruling by the U.S. Supreme Court in 1993 (Daubert v. Merrill Dow Pharmaceutical [Daubert]), one of the most talked about, written about, and frequent conference topics is the general issue of admissibility of expert opinion. Early on, several authors warned of the coming demise of any rehabilitation testimony that did not adhere sharply to the four Daubert standards (Caragonne, 1999; Feldbaum, 1997; Mayer, 1998; & Stein, 2002). Emerging as well was the less stringent view that, in light of Kumho (Kumho Tire Company v. Carmichael [Kumho], 1999) and Joiner (Joiner v. General Electric [Joiner], 1997), the Daubert factors were not meant to strictly govern all testimony, but that other factors might apply – especially in the social sciences. Several authors (Bernstein, 1998; Field, 2002; Field, 2006; Field & Choppa, 2005; Neulicht &, Barros-Bailey, 2005; Staller, 2002; and Weed & Johnson, 2006) presented a view of the Daubert issue which was much less threatening and, in fact, has resulted in being a rather relatively minor problem for rehabilitation consultants in terms of

meeting the "scientific" standards. Clearly, the strict Daubert view has been on the losing side of the admissibility battle for several good reasons – a battle lost that some professionals still fail to comprehend.

Parallel to the Daubert debate has been a growing discussion of the efficacy of a reliance on the use of clinical judgment for non-science situations. In addition to the Choppa, et al. (2004), Downie and Macnaughton (2001) challenge the wide-spread view that all of medicine is scientific and evidenced-based. As an alternative, the authors make a case for clinical judgement, sufficiently based on technical evidence which may be neither quantifiable or even scientific, but would certainly contain judgments based on the best information available, including scientific and/or technical information. In leading up to an appropriate understanding of the meaning of clinical judgment for the rehabilitation profession, the following considerations are presented.

1. The Rulings: A careful reading of the rulings (Daubert, 1993; Kumho, 1999; Joiner, 1997; and Paoli Railroad Yard PCB Litigation [Paoli], 1994) clearly suggest that the criteria for deciding on the admissibility of testimony comes with latitude (discretion) on the part of the gatekeeper with *leeway** to include other criteria which *may** be more appropriate to the facts of the case (as cited in Field, 2006). To assert that the four Daubert criteria should be the standard for all testimony is over-reaching and not supported by the Daubert and Kumho courts, or rulings from the lower courts.

2. The Federal Rules of Evidence: The Federal Rules of Evidence (FRE), and especially FRE 702 (see below), are the prevailing procedural and judicial guidelines for admissible testimony. In fact, the Daubert ruling was predicated largely on the FRE 702 underpinning (Daubert, 1993; also see Countiss & Deutsch, 2002).

3. Specialized and Technological Knowledge: FRE 702 (as cited in Weed & Johnson, 2006) identifies both "scientific" and "specialized and technological" knowledge as if to suggest that these two entities are different. Daubert (1993), and the four-point criteria, relates directly to "science" testimony and the scientific method. "Specialized and technical" as discussed in Kumho (1999) knowledge relates more to the social sciences which are not always subject to scientific inquiry.

4. Judgment and Common Sense: Some issues can be decided by good judgment and simple common sense (Ireland, 2009, p. 120). For example, to apply the Daubert criterion of the estimation of error rate to a life care plan makes no sense at all. An estimate of standard error is a "measure of the variability of a sampling distribution" of a previous statistic, i.e. the distribution of mean scores" (Downie & Heath, 1970, p. 160). As such, there is not much in the world of the social sciences, and rehabilitation planning, in particular, that lends itself to strict

scientific statistical measures. That is, through simply good judgment and common sense some issues can be addressed by way of the specialized knowledge that professionals in the rehabilitation arena possess from education, training, certifications and other professional means (Countiss & Deutsch, 2002). This specialized knowledge it utilized in opinions and recommendations based on clinical judgment as defined and generally accepted in the field (Choppa et al., 2004).

5. Court Rulings: A review of subsequent rulings in the lower courts involving expert testimony from vocational rehabilitation consultants and life care planners (Field & Choppa, 2005; Weed & Johnson, 2006) clearly indicate that the four Daubert factors do not always strictly apply to the facts of the case. In fact, there is only one case (Kinnaman v. Ford Motor Company, 2000) the authors found in which a judge dismissed a case outright based on the Daubert factors. One issue for the Kinnaman case was that the vocational expert utilized an Internet based computer program as a foundation for her vocational opinion. The court determined that her testimony did not include "corroborating evidence that the methodology…is acceptable, had been tested and is generally accurate…and that it is used by other persons in her discipline…" (as cited in Field & Choppa, 2005, p. 13). Since similar cases have been allowed by courts in various jurisdictions (Field & Choppa), it appears that the expert may have erred by not explaining, or being able to explain, the methodology on which the computer program was based.

Staller (2002) and Countiss and Deutsch (2002) have suggested that the two Daubert criteria that reasonably relate to the social sciences are peer review and general acceptance. Furthermore, Bernstein (1998) acknowledged that the application of the four Daubert factors to non-scientific testimony would mean excluding all non-scientific testimony.

6. The N of 1 Argument: Finally, working with people, and especially people with disabilities, results in an individual work product (Choppa & Johnson, 2008). For example, it is clear and obvious that not all people with a traumatic brain injury should be treated the same. Due to the individual's unique characteristics rehabilitation plans will reflect opinions and recommendations that are relevant only to that individual (Ripley & Weed, 2009). However, the methodology for the process of determining needs could be the same for clients with substantially varying disability related differences (Countiss & Deutsch, 2002; Weed, 2009). There are several publications recounted in the Countiss and Deutsch article that provide the foundation for the value of credentials, specialized knowledge, expertise and utilization of an established methodology in developing life care plans. For example, one of the first studies of the reliability of life care planning methodology by Sutton, Deutsch, Weed, and Berens (2002) demonstrated that no significant difference was found between original life care plans and updated life care plans in two professionals' caseloads representing a wide varieties of disabilities, ages and gender. The consistent factor was that both caseloads utilized the published life care planning methodology.

There are so many individual factors (Field, 2008) such as age, gender, educational background, work experience, wage earning capacity (Dorney, 2008), and the severity of the person's disability, to name just a few. At the same time, the professional associations in the field of rehabilitation and life care planning have delineated the various competencies, procedures, methodology, standards and ethical components of a responsible rehabilitation practice with an emphasis on individual planning (Field, et al., 2009). Over-reliance on large sets of survey data, or placing people into categories of disability groups, such as "severe disability" or "not severe disability", fails to reasonably account for individual differences of a person's capacity to work and earn money. That is, (example of flawed rationale) the client is considered severely disabled, therefore there is no need to evaluate the client because one only needs to know the data associated with people who are also severely disabled and those data supply the answer.

Federal Rule 702

This important rule reads as follows:

> *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.*

As noted in the Kumho ruling,

> *The Daubert gatekeeping obligation applies not only to scientific testimony, but to all expert testimony." The key word in Rule 702 is the word "knowledge", not scientific, or technical, or specialized. Some knowledge is scientific, and in those cases the Daubert rule would more appropriately apply. In Kumho, the decision noted that "a trial judge determining the admissibility of.... testimony may (italicized in the written opinion for emphasis) consider one or more of the specific Daubert factors. The emphasis on the word "may" reflects Daubert's description of the Rule 702 as a flexible one.... the Daubert factors do not constitute a definite checklist or test. Some of those factors may be helpful in evaluating the reliability even of experienced-based expert testimony. It is only partially true that the Daubert factors must be applied in all cases (science or non-science).***

Finally it has been well established that there exists both latitude and flexibility in the application of FRE 702 within the intent and meaning of the Daubert, Kumho and Joiner

rulings. Burnette (2000) reaches the following conclusion on the admissibility of courtroom testimony:

> *The US Supreme Court recognized the difficulty in applying specific criteria outlined in Daubert to all types of testimony. It held the four-part test outlined in Daubert was non-exclusive and a "flexible" approach to the assessment of reliability should be applied using factors appropriate to the particular case. In certain cases, virtually none of the specific criteria outlined in the Daubert case would be applicable. In those cases, the trial judge would be given broad discretion in considering other factors which might establish reliability for the specific type of expert testimony at issue.***

A Definition of Clinical Judgment

It is clear from actual court rulings, that all testimony does not require the scrutiny or strict application of the four Daubert factors. It is incumbent upon the expert to show that their testimony is both relevant and reliable as required by both the Daubert and Kumho rulings of the US Supreme Court. In particular, the twin tests, as suggested by Staller, are the tests of peer review and general acceptance (the old Frye standard). The definition of clinical judgment, first drafted and published by Choppa, et al., (2004), reflects the important components of FRE 702, and is consistent with the intent and meaning of the US Supreme Court cases of Daubert (1993), Joiner (1997), and Kumho (1998), all within the knowledge and skill parameters of the expert. The definition also acknowledges that rehabilitation and life care planning on behalf of a rehabilitation client must address the individual factors and issues that are germane to that particular client. In a very real sense, data and information are applied to the individual – a methodological approach of an "N of 1."

> *Clinical judgment requires that the final opinion be predicated on valid, reliable and relevant foundation information and data that are scientifically established through theory and technique building which has been tested, peer reviewed, and published, with known error rates, and is generally accepted within the professional community. In cases where any of the above factors do not apply, but other factors have greater relevance, the expert will rely on these other factors within a methodological approach, based on the expert's knowledge, skill, experience, training, or education in order to assist the trier of fact to reach a conclusion. Therefore, clinical judgment, which is the extension of the credentialing factors of the expert, encompasses all relevant factors germane to the weight of the case while discarding those factors which are not relevant, and which are allowed by the court (Choppa, et al., 2004).*

In support of the above concept, Richard Countiss, an attorney, co-authored an article (Countiss & Deutsch, 2002) which was the basis for a "friend of the court" brief. Drawing upon the

standards for physicians, he asserts:

> *Standards exist for the evaluation and diagnosing of the patient, choosing the procedure, applying the procedure and following-up with the patient. Yet within those standards, the physician has the ability to exercise a range of professional judgments that take into consideration individual patient differences, variations in the specific nature of the disorder, and variations in how best to apply specific procedures to individual patient differences. This same need for Rehabilitation Experts/Case Managers to exercise professional judgment is a component of the Life Care Planning process. However, this must be done within the context of the standards noted and a careful balance between published, accepted standards and professional judgment must be maintained. Published standards are never an excuse for failing to exercise appropriate professional judgment yet, at the same time, one can not say that they chose to exercise professional judgment as a means to simply, and lightly, dismiss accepted standards* (p. 40).

Relevant Case Studies

The following four cases (as reprinted with permission from Weed & Johnson, 2006) as well as a fifth case (as reprinted with permission from Field & Choppa, 2005) represent examples of actual court decisions which are relevant to the above topic. The first three court decisions allow testimony and the fourth represents a situation where the expert was well qualified based on credentials, but the expected testimony was deemed unreliable and the person was excluded from testifying. The fifth case represents an attempt by an expert to offer his opinion based on a "hybrid" of two well known methodologies, but resulted in an appeal and remand for new trial on damages. Perhaps of special interest is case #3, Hanford Nuclear Reservation, where extensive transcripts and information has been published (see below for more information). The expert overcame objections because he was able to substantiate his opinions based on, experience, education, special skills and reliance on standards and methodologies generally accepted by other practicing professionals in the field of rehabilitation consulting.

Case #1: Testimony allowed although expert's credibility and plan foundation was successfully questioned and case remanded for new trial.

Francis Adeola and grace Adeola, individually and for the use and benefit of their minor child, Fadeka Joyce Adeola v. Dr. Shawn M. Kemmerly, Dr. Michael A. Frierson, Dr. Niels J. Linschoten and Ochsner Clinic State of Louisiana Court of Appeals, First Circuit 2001 CA 1231 (Judgment Rendered: June 21, 2002)

The first case (Adeola et al., v. Dr. Shawn M. Kemmerly) involves a plaintiff who was a young

child who had routine blood work as a part of a well baby checkup. The stick site became infected, but initially was diagnosed as a sprained wrist. By the time that the correct diagnosis was made, the infection had become quite serious with bone infection, compounded by other complications, "resulting in a weaker, shorter, severely scarred arm, in addition to permanent limitations on her activities and movements" (p. 3).

The appealing party, Louisiana Patient's Compensation Fund (LPCF), argued that an exorbitant award for damages was reached by the jury after a judge purportedly improperly allowed testimony without proper cross-examination of the expert's credentials in front of the jury "…thereby preventing the jury from having a basis for evaluating credibility…." (p. 2).

At trial, the defendant requested, and the trial court granted, a Daubert/Foret hearing of the life care planning expert outside of the jury's presence. After the hearing, but before the jury returned to the courtroom, the judge commented that he thought the proffered professional was "eminently qualified as a life care planner and rehabilitation expert" p. 4). Citing Rule 702, the judge decided that the jury would benefit from hearing his testimony. However, when court resumed with the jury present, when the defendant counsel attempted to conduct voir dire, he was told by the judge that qualifications were already covered in the hearing. As an apparent way to shorten the process, the judge instructed the jury as follows, "As previously indicated, the court has instructed you as to testimony of expert witnesses because even though the court finds one to be an expert, the weight to be given is decided by you" (p. 5) and instructed the attorney not to question the expert about his background or credentials.

The defendant's attorney argued that he should have been allowed to conduct voir dire in front of the jury since it could affect the jury's view of the expert's credibility. In agreement, the appeals court commented, "Without a full cross examination of [the expert's] background, qualifications and credentials, the jury could not properly weigh [the expert's] testimony and evidence, nor properly determine the value of the evidence and testimony. The lack of a full cross examination impermissibly denied LPCF the right to fully present its case and therefore, it was denied the right to a fair trial" (p. 8). Further, "We conclude that [the expert's] testimony, the weight of his testimony, and the credibility determination regarding his credentials and qualifications as an expert witness, were of critical importance to the jury's decision. We cannot conduct a meaningful *de novo* review because it would involve eliminating all of [the expert's] testimony, thereby depriving plaintiff of a jury trial on the quantum issue" (p. 9). The bottom line; the judgment was vacated and remanded for a new trial.

One important aspect of the above case is that the role of the judge as a gatekeeper does not necessarily mean that the judge will prevent an expert from testifying when their credibility may be under scrutiny. Instead, the jury will be charged with assessing not only the value of the testimony but the credibility of the witness as well.

Case #2: Expert's testimony was neither speculative nor unreliable and appeal was denied.

Ruby Kay Ballance, et al. v. Wal-Mart, No. 98-1702, U. S. Court of Appeals for the 4th Circuit, 1999, U.S., App. Lexis 7663

In Ballance et al. v. Wal-Mart, 1999, while shopping at Wal-Mart, the plaintiff fell when she apparently slipped on plastic hangers left on the floor. The main focus of the appeal was whether Wal-Mart was liable for the injuries which were complicated by pre-existing conditions (asymptomatic congenital spine defects). However, part of the appeal (the only part to be addressed in this summary) was the argument by Wal-Mart that the damages related experts should have had their testimony limited under the standards as set forth by Daubert v. Merrell-Dow Pharmaceuticals decision relating to scientific expert evidence. Identified were the well known four factors: (1) The extent to which the theory has been or can be tested; (2) Whether the theory has been subjected to peer review and/or publication; (3) The technique's potential rate of error; and (4) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community.

Further, under Kumho Tire v. Carmichael, the Supreme Court extended the gatekeeping function to all expert testimony, not just "scientific" testimony. ". . . the Court explained that this discretion is not confined to application discussed in Daubert. Id. At *9-10. Rather the district court has 'considerable leeway' to examine any number of factors in determining whether expert testimony is reliable; these factors may included, but are not limited to, the Daubert factors" (p. 4). In the case of Kumho Tire, the district court was correct in the decision to exclude the testimony of the tire expert as unreliable.

In the Ballance case, the expert offered two alternative life care plans: One where treatment successfully stabilized the patient's medical condition and the other in the event the patient's condition declined. Wal-Mart did have their own expert witness to counterclaim come of the plaintiff's expert's opinions.
Wal-Mart argued that one of the medical experts, on which much of the life care plan was based, offered opinions which were speculative and unreliable. Some future care and conditions might be "possible" and Wal-Mart argued the testimony would have been limited. However, Wal-Mart's expert testified that (for an example) an anticipated surgery was 80% likely to be successful, but agreed it could also worsen the condition (including loss of bowel and bladder function and the ability to walk).

Turning to the life care plan, Wal-Mart argued that future care plans are contingent upon future events and choices and therefore are unreliable and speculative. Additionally, they argued that under Federal Rules of Evidence 403,*** the life care plan expert's testimony should have been limited. However, the district court was found to have exercised proper discretion and the appeal was rejected. First, this case underscores the value of separating probable vs. possible future care. In the original format of the life care plan literature (Deutsch & Raffa, 1981, *Damages in Tort Action*) the authors included a page for listing "Potential Complications" for which no prediction of duration or frequency could be determined. Secondly, opinions based on

clinical judgment relating to two possible scenarios were accepted as reasonable and reliable.

Case #3: Expert did possess specialized skills and knowledge and relied upon accepted methodologies and was allowed to testify.

In RE Hanford Nuclear Reservation, No. CY-91-3015-WFM, United States District Court for the Eastern District of Washington at Spokane (January 21, 2005). [Also see Choppa, T., Field T. & Johnson, C. (2005). The Daubert challenge: From case referral to trial. Elliott & Fitzpatrick: Athens, GA. for extensive transcripts and notes regarding this case.]

In this case, the Daubert related hearings took prior to trial. A rather extensive challenge was launched with examples as follows (1) the expert is not qualified to offer opinions regarding radiation, (2) the expert relied exclusively on plaintiffs' experts, (3) expert "worked here as an information coordinator and scrivener, not medical or rehabilitation expert" (Choppa, Field & Johnson, p. 42), (4) portions of the life care plan were not based on "more probably than not" concept, (5) past cost analysis was simply a compilation as determined by plaintiffs' experts, and (6) the expert's opinion included personal observation of the plaintiffs under the guise of an expert opinion. In addition to the rebuttal by a plaintiff's attorney, the expert offered his own report with extensive support for how a life care planner conducts an evaluation and publishes an opinion. Topic headings included experience, ethics, associations, existing standards, and specific responses to the defendant's motion.

The court's ruling was that the expert would be able to testify regarding the data in the life care plan, although unless medical testimony supported surgery, this item should be removed. Additionally, the expert could testify about his interactions with the plaintiff but may not offer an expert opinion as to the plaintiff's credibility.

Case #4: Expert for the plaintiff was deemed well qualified, but opinions were not consistent with foundation testimony and opinions and she was excluded.

Cindy Taylor, Individually and as Guardian Ad Litem for Brody Patrick Wright and Arthur M. Taylor vs. Speedway Motorsports Inc. and Charlotte Motor Speedway, LLC, doing business as Lowe's Motor Speedway; Tindal Corporation, formerly Tindall concrete Products, Inc and Anti-Hydro International , N.C., Mecklenburg County Super. Ct.: 01-CVS-12107

This case relates to a successful motion to exclude a life care planning expert who was expected to testify on behalf of the plaintiff. The judge embellished on his ruling on March 7, 2003 with following commentary.

"…the Court notes that the witness [for the plaintiff] wishes to express an opinion or numerous opinions without the proper foundation, in the opinion of the Court, having been laid for the expression of said opinions. The Court finds that these opinions are entirely speculative, for example, including, but not limited to, the following examples: Expressing her opinions as to

how the plaintiffs would be seen and treated by various health care providers in years to come and the cost of that, without evidence to substantiate that or lay a proper foundation for that. Secondly, expressing opinions as to the medical equipment of the plaintiffs 15 or more years in the future, when the treating physicians have not indicated in their testimony any substantiation for this opinion. The record is devoid of any such evidence, in the opinion of the Court. Third, that she expresses opinions as to what surgery would be needed and the frequency of surgery for as far out as ten years from now when there is no medical evidence to support that. The Court finds, in its discretion, that the proffered testimony is unreliable and is not relevant therefore. I am basing this ruling in part on Kumho Tire vs. Carmichael – I do not have the U.S. citation, it's 119 Supreme Court 1167;Daubert vs. Merrell Dow Pharmaceuticals, 509 U.S. 579; State vs. Bullard, 312 NC 129; State vs. Spencer, 119 NC Appellate 662. Further, the Court finds that the proffered testimony would not be helpful and will not assist the jury in understanding the evidence or determining the facts in issue. Further, the Court finds that for all of the above reasons the probative value of such testimony is substantially outweighed by the danger of unfair prejudice, misleading the jury, and waste of time. The Court further notes and finds as a fact that there has been no peer review of the testimony or of the anticipated testimony of this witness. There is no publication to which reference has been made in any testimony that would substantiate this. There has been no offer of visual aids to assist the jury. And for all of these reasons the testimony of [the expert witness] is excluded" (pp. 33-34).

The wording by the judge encompasses several areas of interest. First, the qualifications of the expert were not in dispute, just the expected testimony. Second, Daubert and Kumho Tire cases were referenced as justification for the judge's "gate keeping" discretion which disallowed testimony rather than giving the jury the responsibility to determine the credibility of witness. Third, another topic which the judge asserted in his commentary was related to Federal Rules of Evidence 403 which indicated that the testimony was, in essence, a waste of the court's time.

A discussion ensued with regard to some deposition testimony which was read where conflicting opinions seemingly were expressed. One example was when the judge referenced the testimony of the treating psychologist stating, "… and it's [the opinions of the life care planner] contrary to what I thought was an outstanding witness, Dr. Owens" (p. 23) and whose recommendations the life care planner apparently ignored or did not accept.

Case #5: Expert testified at trial that the client was 50 to 60% disabled by combing two well known methodologies into a hybrid approach, resulting in an appeal and remand for new trial on damages (for this issues and others).

Elcock vs. K-Mart Corp. (1998, US Ct of Appeals, 3rd Cir, No. 98-7472)

There were several issues discussed in this appeal, but a central theme was related to the expert's "thin" vocational rehabilitation education and knowledge and his unique application of two existing disability determination methodologies. The court allowed the expert to testify without allowing a Daubert type hearing. K-Mart asserted that the expert provided unreliable

testimony on which, in part, the jury relied when determining the damage award. The court of appeals agreed.

The expert opined that Elcock was between 50 and 60 percent vocationally disabled and that this disability was permanent. When pressed for an explanation of the methodology used, he testified:
"I use a combination of the procedure recommended by Fields [sic] which is to look at level of preinjury access to the labor market and post injury access and the percentage and the difference between those percentages Fields says is the loss of jobs or the lost percentage. I also looked at which is what I normally do at the procedure recommended by Anthony Gamboa and he suggests that you look at all the factors involved in the client's analysis, injury, test results, psychological results, the client's statements, and so on, and then you as the clinician must make a, you as a vocational expert must make an estimate. And so what I do is I use Fields analysis as a starting point and then I revert to Gamboa to depart from Fields [sic] to come up with an estimate" (p. 20).

The appeals court countered with: "However, we are inclined to view [the expert's] admittedly novel synthesis of the two methodologies as nothing more than a hodgepodge of the Fields and Gamboa approaches, permitting [the expert] to offer a subjective judgment about the extent of Elcock's vocational disability in the guise of a reliable expert opinion" (p. 21). It is valuable to note that: "K-Mart does not dispute that the Fields[sic] and Gamboa approaches are accepted methodologies in the vocational rehabilitation field; what it does challenge is [expert's] combination method" (p. 20).

The above case summarizes most issues relevant to this paper. The court needed to determine if the expert was qualified to testify regarding vocational rehabilitation by education, experience, knowledge, training and skill and the testimony would assist the jury in reaching a decision. There is an extensive review of these factors in the appeals court decision. Further, the expert was allowed to express opinions based in part on clinical judgment, which was termed in the appeal as the expert's "ipse dixit statement" (p. 18) or because he said it, therefore it is so. However, the appeals court rejected the expert's opinions based in part on the lack of evidence that the hybrid concept was generally accepted and the case was remand for a new trial on damages.

Conclusion

In conclusion, the issues surrounding admissibility of testimony, in view of the more scientific criteria of Daubert and the broader standard established by Kumho and Joiner, have been largely settled. An emphasis on the appropriate methodology or methodologies is in order. Clearly, given the fact that individual persons require individual attention through evaluation and assessment, planning, resource development, and the reliance on foundation data and information, a reasonable course is to apply clinical judgment skills to problem-solving consistent with all the facts of the case. Objective data (i.e., test scores, computer analyses,

consultants' reports, etc.) are required "to provide a concrete basis for the making of some decisions, and to make somewhat less intuitive some of the clinical judgments which have to be made when objective data are lacking" (Super & Crites, 1949, p. 596). Furthermore, courts rulings underscore that testimony must be reliable and based on generally accepted methodology. The days of opinions founded simply on one's experience or offering some unique obscure, esoteric theory are probably over. In the final analysis, however, in instances of opinion development with most rehabilitation cases, the rehabilitation and life care planning consultant must rely on a methodology that includes clinical judgment.

Notes:

* These two words were italicized in the Kumho ruling for emphasis.
** This brief section on FRE 702 has been abstracted from Field and Choppa (2005, p. 3-4).
***(Editor's note: Rule 403 refers to "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Source: http://www.law.cornell.edu/rules/fre/rules.htm#Rule403.)

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Biographies

Timothy F. Field, Ph.D., is co-owner of Elliott & Fitzpatrick, Inc. in Athens, GA, a publishing firm for rehabilitation journals, books, and related resources. Dr. Field is also an author, seminar and conference speaker, and a consultant to other professionals in the field.

Anthony J. Choppa, M.Ed., CRC, CCM, is co-founder of OSC Vocational Systems in Bothell, WA. Mr. Choppa, in addition to managing a staff of over fifty rehabilitation counselors and case managers, also serves as a vocational and care planning expert in litigated cases.

Roger O. Weed, Ph.D., CRC, CDMS, LPC, CCM, FNRCA, FIALCP, is distinguished university professor and coordinator of the graduate rehabilitation counseling program at Georgia State University in Atlanta, and is a frequent speaker at regional and national conferences.

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