Judges’ Panel:
Admissibility of Expert Testimony

Friday, April 1, 2016

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Kyle graduated from the College of William and Mary in 2003, and the Washington and Lee University School of Law in 2006. After graduating from law school, Kyle clerked for the Honorable Walter D. Kelley, Jr. of the United States District for the Eastern District of Virginia, practiced in the complex litigation section of an international law firm and, before joining MichieHamlett, clerked for the Honorable Boyce F. Martin, Jr. of the United States Court of Appeals for the Sixth Circuit.

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TITSWORTH v. TESTING

Navigating the Scylla and Charybdis of Testing Doctrine and Admission of Expert Testimony after Hyundai Motor Co. v. Duncan

Prepared in Connection with the Judges’ Panel of the 2016 Virginia Trial Lawyers Association Annual Convention

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Scylla and Charybdis

From Encyclopedia Britannica:

Scylla and Charybdis, in Greek mythology, were two immortal and irresistible monsters who beset the narrow waters traversed by the hero Odysseus in his wanderings described in Homer’s *Odyssey*, Book XII. Scylla was a supernatural female creature, with 12 feet and 6 heads on long, snaky necks, each head having a triple row of shark-like teeth, while her loins were girdled by the heads of baying dogs. From her lair in a cave she devoured whatever ventured within reach, including six of Odysseus’s companions.

Charybdis, who lurked under a fig tree a bowshot away on the opposite shore, drank down and belched forth the waters thrice a day and was fatal to shipping. Her character was most likely the personification of a whirlpool. The shipwrecked Odysseus barely escaped her clutches by clinging to a tree until the improvised raft that she swallowed floated to the surface again after many hours. Scylla was often rationalized in antiquity as a rock or reef. Both gave poetic expression to the dangers confronting Greek mariners when they first ventured into the uncharted waters of the western Mediterranean. To be “between Scylla and Charybdis” means to be caught between two equally unpleasant alternatives.
1. Rule 2:702 TESTIMONY BY EXPERTS
   (a) Use of Expert Testimony

   (i) In a civil proceeding, 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. [Va. Code § 8.01-401.3(A)]

   (ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.

   (b) Form of opinion. Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

2. Rule 2:703 BASIS OF EXPERT TESTIMONY

   (a) Civil cases. In a civil action an expert witness may give testimony and render an opinion or draw inferences from facts, circumstances, or data made known to or perceived by such witness at or before the hearing or trial during which the witness is called upon to testify. The facts, circumstances, or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence. [Va. Code § 8.01-401.1]
(b) **Criminal cases.** In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

3. **Rule 2:705 FACTS OR DATA USED IN TESTIMONY**

   (a) **Civil cases.** In civil cases, an expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [Va. Code § 8.01-401.1]

   (b) **Criminal cases.** In criminal cases, the facts on which an expert may give an opinion shall be disclosed in the expert's testimony, or set forth in a hypothetical question.

**Testing by Experts – Historically the Third Rail of Civil Litigation**

   a. Motor vehicle collision case where defense introduced biomechanical and impact analysis expert testimony. The jury returned a verdict for the defense.

   b. Experts relied upon testing to opine as to the forces at issue in the crash and the effects of those forces on the human body.

   c. “[W]here tests are involved, such testimony should be excluded unless there is proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially similar.”

   d. Supreme Court reversed because “the challenged expert testimony is speculative, is founded upon assumptions lacking a sufficient factual basis, relies upon dissimilar tests, and contains too many disregarded variables.”
   
a. Motor vehicle case where the defendant offered a staged photograph to recreate his perspective as he approached the scene, as well as an accident reconstruction expert. Jury verdict for the defendant.

b. Regarding the photograph:
   
i. “A staged photograph purporting to depict the circumstances existing at the time of an event, . . . is in the nature of a test or experiment which is offered for the same purpose.”

ii. “Accordingly, the party who offers such evidence must show that the reconstruction or recreation is substantially similar, although not necessarily identical, to the actual event in all of its essential particulars.”

iii. Because the defendant indicated that the photograph was “somewhat similar” to what he saw on the day of the incident, and not “substantially similar,” the Supreme Court ruled it was error to admit the photograph.

c. Regarding the accident reconstruction expert:
   
i. “This Court repeatedly has held that, applying that standard, accident reconstruction expert testimony is rarely admissible in Virginia because it invades the province of the jury.”

ii. The expert’s testimony “testimony was largely irrelevant to any legitimate area of inquiry, repeatedly invaded the jury’s province as factfinder, and offered speculation in the guise of scientific opinion which, when presented through the testimony of an expert, prejudiced Brown’s case.” The Supreme Court therefore reversed.
   a. Products liability case where Plaintiff wanted to offer testing that would tend to show a defect in a safety release valve and also that there need to be warnings. Trial court excluded the tests.

   b. “The results of experiments are not admissible in evidence unless the tests were made under conditions which were the same or substantially similar in essential particulars to those existing at the time of the accident.”

   c. Here, because the components involved in the incident that caused the injury had been used for one application for some time, whereas the identical components used for the tests had been used for a different application, the Supreme Court found that the trial court properly excluded these tests because they failed the “substantial similarity” inquiry.

   a. Products liability claim in which Plaintiff sought to introduce evidence of prior similar incidents to prove notice, and also sought to have his expert rely upon those same incidents in forming his opinions.

   b. Supreme Court ruled that the prior incidents were inadmissible on their own because they failed the “substantial similarity” test.

   c. Supreme Court also precluded the expert opinion because “an expert cannot offer opinion testimony based on evidence that fails the substantial similarity test.” (citing, among others, *Titsworth* and *Featherall*)

   d. Though not a testing case, *Funkhouser* concerns the same “substantial similarity” test and indicates that, not only would tests themselves be inadmissible, but expert testimony that relies upon such tests would also be inadmissible.

1. **Facts**
   a. Products liability case about the failure of a side airbag to deploy
   
   b. Defendants moved to exclude the plaintiff’s expert on defect and causation – that the airbag should have been in a different place and would have deployed had the sensor been in that different place
   
   c. Trial court permitted the expert to testify and the jury returned a verdict for the plaintiff
   
   d. On appeal, even under abuse of discretion review, the Supreme Court reversed

2. **The Law**
   a. “Expert opinion may be admitted to assist the fact finder if such opinion satisfies certain requirements, including the requirement of an adequate factual foundation.”
   
   b. “Expert opinion must be premised upon assumptions that have a sufficient factual basis and take into account all relevant variables.”
   
   c. “Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible.”
   
   d. “Furthermore, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed.”

3. **Here Come the Feds!!**
   a. “Although experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion ‘which is connected to existing data only by the *ipse dixit* of the expert.’ *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (decided under the version of Fed.
R. Evid. 702 which the General Assembly adopted, verbatim, in current Code § 8.01-401.3(A)).”

b. *General Electric* is a *Daubert* progeny case that is recognized as having expanded the holding in *Daubert* and its empowerment of the court to screen expert testimony.

4. **Testing, Calculations, Algorithms**
   a. “Mahon’s opinion that the 2008 Tiburon was unreasonably dangerous was premised upon his assumption that the side airbag would have deployed if the sensor had been located on the vehicle’s B-pillar.”

   b. “Yet, as Mahon readily conceded, he did not perform any analysis or calculations to support this assumption.”

   c. “In fact, Mahon admitted that the crash sensing system depends upon a combination of the structure of the vehicle, the sensors themselves, and any algorithm, but he did not perform any tests to determine whether a different sensor location, structure, or algorithm would have caused the side airbag to deploy in Gage’s crash.”

5. **The Punchline**
   a. “Mahon’s opinion that the 2008 Tiburon was unreasonably dangerous was without sufficient evidentiary support because it was premised upon his assumption that the side airbag would have deployed if the sensor was at his proposed location — an assumption that clearly lacked a sufficient factual basis and disregarded the variables he acknowledged as bearing upon the sensor location determination.”

   b. “Mahon’s opinion that the vehicle was unreasonably dangerous was based on his *ipse dixit* assumption that the side airbag would have deployed in Gage’s crash if the sensor had been located on the B-pillar.”

   c. Thus, the takeaway seems to be that the reason the expert’s opinion was found to have an inadequate factual basis is because the expert
had conducted no tests, calculations, or “analysis” to verify his hypothesis.

6. But Wait
      i. Food poisoning case against a restaurant in which the jury had returned a verdict for a plaintiff.

      ii. The trial court set the verdict aside because it believed the plaintiff’s causation expert lacked an adequate basis for his testimony due, in part, to “the lack of laboratory testing.”

      iii. On appeal, the Supreme Court reversed, and explicitly stated “we have never required positive proof by scientific testing to establish a factual basis for” expert causation opinion.

   b. Legislative Response to Hyundai - 2015 HB 1476; SB 861
      i. Originally just bills, introduced before Duncan, to amend sections 8.01-401.2 and 8.01-581.1 to allow nurse practitioners to testify as experts and to be considered “health care providers.”

      ii. Amended in mid-February 2015 – approximately one month after Duncan

      iii. “Nothing in this act, § 8.01-401.2:1, or § 8.01-401.3 shall be construed as a codification of Rule 702 of the Federal Rules of Evidence as presently construed.”


      v. This provision, known as an “enactment clause,” likely will not end up in the Virginia Code, but it still carries the force of law as an Act of Assembly. Gilmore v. Landsidle, 252 Va. 388, 394 (1996).