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So You Think You're an Expert: Intro. to Expert Testimony & Review of *Carter v. Robinson*

As I noted last week in our discussion of the Indiana Supreme Court decision in *Robertson v. B.O.*, the issue I originally planned to discuss was the law on expert testimony through the Indiana Court of Appeals opinion *Carter v. Robinson*. After being asked whether I would ever go back and revisit the *Carter* case and expert testimony, I have decided to dedicate this week's post to it.

Despite what you see on T.V., a court does not just let any quack come into the courtroom and speak to a jury. Moreover, contrary to the scores of self-proclaimed experts that you might meet throughout your day-to-day life, an expert witness does not merely get to proclaim himself an expert and be permitted to testify as such. It may also come as a surprise that not every expert speaks with a British accent. That is, at least, not anymore. That was actually an old rule of thumb, at least so my patent litigation professor would have me believe. The idea was that jurors found experts more believable when they have British accents.

But, I digress.

As you may have guessed, the role of an expert witness at trial is a major

issue in many cases. Juries are selected from among your peers. As a result, it is often necessary for an expert to speak to the jury and to teach as well as explain the issues in a case. What necessarily accompanies expert testimony is the mighty title of "expert" for the person giving the testimony. A natural consequence of this title is that juries give this testimony great weight.

The problem, then, with allowing just anyone to come in and profess to be an expert is that it gives the jury the signal to trust and rely in what is being said even though the speaker may be no more reliable than a freshman quarterback under pressure. In order to protect the trial from being tainted by frivolous and unsubstantiated expert testimony, the law recognizes two basic touchstones for determining whether an expert may testify on an issue. Those two touchstones are the Rules of Evidence and the Supreme Court of the United States (often call SCOTUS for short) decision *Daubert v. Merrell Dow Pharmaceuticals, Inc*.

One very important note to keep in mind, even though a state court's evidentiary rules may be very similar or even identical to the Federal Rules, the rules may be applied differently. At its core, expert testimony is merely evidence. The determination of whether something can be admitted into evidence is primarily a matter of procedure determined at the level of body that makes rules that control that specific court. For example, if your case is in the Federal District Court for the Southern District of Indiana in Indianapolis then you will look to the Federal Rules of Evidence. However, if your case is a couple blocks to the southeast, in a Marion County court, then you will need to consult the Indiana Evidence Rules. Even though Indiana bases its evidentiary rules off of the Federal Rules, they are not identical as will be explained further below.

Returning to the basics of determining whether an expert can testify, the function of the court is typically described as "a gatekeeping function of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Where the evidentiary rules are based on the Federal Rules, this role is described by Rule 702. Here is an example where we can see that the Indiana Rules and the Federal Rules differ.

> **Federal Rule of Evidence 702. Testimony by Expert Witnesses:**
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;

> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.
>
> **Indiana Evidence Rule 702. Testimony by Experts:**
> (a) 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.
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

As you can see, the rules get to the same basic point – that there be a determination whether the expert has some particular knowledge that can help a jury and whether the expert's findings are reliable. However, the way that the two rules get there are obviously different.

The differences do not end with the specific text of Rule 702. Recall that I stated that there are two touchstones for expert testimony. One was the Rules. The other was the case *Daubert v. Merrell Dow Pharmaceuticals, Inc*. *Daubert* was a 1993 decision from the nation's highest Court that set forth a list of factors for a judge to consider before allowing an expert to testify. Let us, for a moment, discuss a bit of semantics, the understanding of which will make this a lot easier. As a general rule, and mind you some are not so mindful as to not muddy up this general rule, there are two kind of tests in the law. That is, two approaches to applying the facts of a case to the law. The two tests are a (1) factors test or (2) an element test. If something is an element test, then every single item listed must be met. However, if something, like the *Daubert* factors, is a factor test, then a court must look at how the facts weigh for each factor and balance those factors to make a determination. The *Daubert* case sets forth a series of non-exclusive factors to consider in whether an expert's testimony is reliable enough to admit. The *Daubert* case has become synonymous with expert testimony. That said, *Daubert* does not apply in every court.

Daubert was a case that decided application of Federal Rule 702. As a result, the importance of the case in a specific proceeding depends on whether the state has modeled its evidentiary rules on the Federal Rules. Lists on whether a state adheres to *Daubert* can be found across the internet. One such list is Martin S. Kaufman's "The Status of *Daubert* in State Courts" for the Atlantic Legal Foundation. A perfect example of how the *Daubert* factors can be applied by a state

is Indiana. In the recent decision *State Automobile Ins. Co. v. DMY Realty Co., LLP*, Judge Brown wrote,

> . . . we observe that the Indiana Supreme Court "has not established a specific test for the scientific admissibility of evidence pursuant to Indiana Evidence Rule 702(b)" and, although the *Daubert* factors can be helpful in that determination, the Court "has not mandated the application of *Daubert* and has chosen alternative approaches in the past."

As you can see, Indiana is a state that patterns its rules after the Federal Rules. Nevertheless, Indiana does not treat *Daubert* as controlling. It is important to recognize that *Daubert* does not apply to all expert testimony, but specifically to scientific testimony as it is rooted in methodology.

With that in mind, let us now return to *Carter v. Robinson*. The case hinged on the admissibility of expert testimony in a medical malpractice claim. Though the case decided four issues, for our purposes it is sufficient to discuss only two. The first issue was whether the trial judge erred when he permitted the plaintiff's expert to testify. The second issue was whether the trial judge made an error when he refused to let the defendant doctor's expert testify. While you may be thinking that this sounds bizarrely unfair and a judge that was playing favorites, I advise you not to jump to such quick conclusions and to follow along.

On appeal, the defendant attacked the testimony of the plaintiff's expert on two grounds. Defendant challenged the expert's methodology in arriving at his conclusion and the facts upon which he relied. "When faced with a proffer of scientific testimony, the court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and reliable." The defendant argued that the doctor settled upon the first cause of death that he came across and failed to conduct sufficient further inquiry.

In determining whether plaintiff's expert used an acceptable methodology, the court looked to the recent decision in *Alsheik v. Guerrero*. In *Alsheik* the court adopted the methodology of a "differential etiology." The methodology is actually fairly well rooted in commonsense.

> In a differential etiology, the doctor rules in all the potential causes of a patient's ailment and then, by systematically ruling out causes that would not apply to the patient, the physician arrives at what is the likely cause of the ailment or death.

Whether a doctor has followed this methodology is a determination to be made in each case. The way to show that the doctor did not is also very straightforward. "In essence, admissible expert testimony need not rule out all alternative causes, but where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that it was not the sole cause, that doctor's methodology is unreliable." The court, looking at the specific facts of the case found the expert had done so.

The second issue was whether the facts upon which the expert based his testimony were reliable. Specifically, defendant challenged the expert's reliance on background information from the plaintiff, the wife of the deceased patient, who had been separated from her husband for a year at the time and had no personal knowledge of his condition. The court found that the fundamentals of this argument went toward the weight of the evidence and not the admissibility. As such, the court found that the trial judge did not err in allowing the expert to testify.

The second issue then is whether the judge made a mistake by not allowing the defendant's expert to testify. The purpose of the testimony of defendant's expert was to challenge the basis of plaintiff's expert's testimony. This is a routine and acceptable practice. However, in this case the trial judge correctly did not allow the testimony. The reason is because defendant, inexcusably, waited too long to disclose his expert. Unlike what T.V. tells you, there really is not such a thing as a "surprise witness." The rules of procedure/evidence set out a laundry list of required disclosures – including the identity of experts. The trial occurred on September 26, 2011. The expert was not disclosed until August 19, 2011. Granted, the plaintiff had been less than entirely efficient in meeting discovery deadlines. Nevertheless, by April 20, 2011, defendant knew that he would need the testimony of his expert. Yet, he did not disclose that expert until just over a month before trial. As a result, the trial judge's judgment was upheld on all issues.

As you can see, the procedures for getting expert testimony before a jury can be treacherous. It is important to find counsel that knows how to handle this process when navigating your case through treacherous waters of litigation.

Join us again next time for further discussions of developments in the law.

Sources

- *Robertson v. B.O.*, 977 N.E.2d 341 (Ind. Oct. 2012).

- *Carter v. Robinson*, 977 N.E.2d 448 (Ind. Ct. App. 2012).
- Federal Rules of Evidence 701-705.
- Indiana Evidence Rules 701-705.
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
- Martin S. Kaufman, "The Status of *Daubert* in State Courts," Atlantic Legal Foundation (2006), available at www.atlanticlegal.org/daubertreport.pdf
- *State Automobile Ins. Co. v. DMY Realty Co., LLP*, 977 N.E.2d 411 (Ind. Ct. App. 2012).
- *Alsheik v. Guerrero*, 956 N.E.2d 1115 (Ind. Ct. App. 2011), *aff'd in part*, 979 N.E.2d 151 (Ind. 2012).