Admissibility of Expert Witness Testimony in Maritime PTSD and Brain Injury Cases

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Post Traumatic Stress Disorder (PTSD) and brain injury cases share a complexity that in most cases requires expert testimony to establish medical causation. Additionally, expert testimony is often relied upon to establish the diagnosis of such conditions and the extent of disability. These two conditions differ in that brain injuries are physical injuries, clearly compensable under the Jones Act. However, most Courts treat PTSD claims as claims for emotional distress. See e.g. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994); Szymanski v. Columbia Transp. Co., a Div. of Oglebay-Norton Co., 154 F.3d 591, 595 (6th Cir. 1998); Complaint of Clearsky Shipping Corp., 1998 WL 560347, at *3 (E.D. La. Aug. 28, 1998); In re Gulf S. Marine Transp., Inc., 2002 WL 83643, at *3 (E.D. La. Jan. 17, 2002); Fernandez v. Aliff, 2008 WL 2026010, at *5 (D.P.R. May 8, 2008); McGee v. Rowan Companies Inc., 2009 WL 3150309, at *3 (E.D. La. Sept. 24, 2009); but see Webb v. TECO Barge Line, Inc., 2012 WL 780851, at *32 (S.D. Ill. Mar. 7, 2012) (noting that an expert “explained that PTSD and major depression are medical conditions and not transitory mental states such as fright, fear, or ‘emotional distress’”) (emphasis in original).

Claims for Post Traumatic Stress Disorder under Maritime Law

Before proceeding to a discussion of the requirements for admission of expert

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2 Decisions in Railroad FELA cases generally apply to Jones Act cases. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (noting that Congress incorporated FELA unaltered into the Jones Act.)
testimony\textsuperscript{3}, it is important to note that a plaintiff can recover for PTSD even without a physical injury. In \textit{Gottshall}, 512 U.S. at 532, (consolidated with \textit{Consolidated Rail Corp. v. Carlisle}), the Supreme Court adopted the “zone of danger” test for claims of emotional distress, including PTSD, in admiralty cases. In \textit{Gottshall}, the Court considered two claims for negligent infliction of emotional distress: that of Carlisle, a plaintiff who had worked for the railroad as a train dispatcher for several years and who suffered a nervous breakdown and other injuries due to overwork; and that of Gottshall, a plaintiff who suffered major depression and PTSD after witnessing a co-worker have a heart attack and die while working.

The \textit{Gottshall} Court adopted the common law “zone of danger” test to determine who may recover for negligent infliction of emotional distress under FELA. \textit{Id.} at 554-57. The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain physical impact as a result of a defendant's negligent conduct or who are placed in immediate risk of physical harm by that conduct. \textit{Id.} Based on that standard, the Court remanded the Gottshall portion of the case for reconsideration under the zone of danger test, and remanded the Carlisle portion of the case with instructions to the lower court to enter judgment in favor of the defendant.

The “physical impact” (meaning either actual impact by a physical object or being in the zone of danger for such an impact) that is a prerequisite for liability encompasses traditional common law concepts of physical impact. \textit{Id.} “Physical object” includes such things as radiation, gases given off as a result of an explosion, and the like. \textit{Szymanski,}\textsuperscript{3}

\textsuperscript{3} This paper addresses the standards for the admissibility of expert witness testimony in federal court. The standards in state court vary, but often apply similar principles.
154 F.3d at 594. But, in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the Supreme Court held that “physical impact” by a carcinogenic substance was not adequate to satisfy the physical impact requirement.

Courts are split on the issue of whether the “zone of danger test” requires a physical manifestation – a physical injury or effect that is the direct result of the emotional injury – in order to recover. See *Tassinari v. Key W. Water Tours, L.C.*, 480 F. Supp. 2d 1318, 1321 (S.D. Fla. 2007) (holding that allegations of physical manifestations of emotional injury are required to state a claim for emotional distress) and *Clearsky Shipping*, 1998 WL 560347 at *3 (holding that a physical manifestation of emotional distress is not required). In *Gottshall*, 512 U.S. at 549, the Supreme Court noted that many jurisdictions that follow the zone of danger also require that a plaintiff demonstrate a “physical manifestation” of an alleged emotional injury, but did not explicitly state whether a physical manifestation is required under maritime law.

Courts have substantial discretion in awarding damages for PTSD. See *e.g., Ibanez v. Velasco*, 2002 WL 731778 (N.D. Ill. April 25, 2002) (upholding a $2.5 million jury award to a plaintiff whose physical injuries were “not severe” and who proffered only $5,737.33 in medical bills because of plaintiff’s emotional injuries, including PTSD); *Schneider v. Nat’l R.R. Passenger Corp.*, 987 F.2d 132, 137–38 (2nd Cir. 1993) (finding jury verdict of $1.75 million awarded to railroad employee in FELA case, including approximately $1 million to compensate plaintiff for PTSD, depression and organic brain syndrome, was not excessive for physical injuries and PTSD); *Kukla v. Syfus Leasing Corp.*, 928 F.Supp. 1328, 1336–37 (S.D. N.Y. 1996) (upholding jury award of $1,350,000
for pain and suffering that was largely for PTSD); Ill. Cent. R.R. Co. v. Gandy, 750 So.2d 527, 533–35 (Miss.1999) (affirming $750,000 award to train conductor who suffered from PTSD after train collision). This discretion includes the right to consider results in similar cases. Farfaras v. Citizens Bank & Trust of Chi., 433 F.3d 558, 566–67 (7th Cir. 2006) (“Awards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive.”).

**Requirements for Admission of Expert Testimony**


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.

Fed.R.Evid. 702.

Daubert clarified that Rule 702 charges the district court with the task of ensuring expert testimony is both relevant and reliable. Daubert, 509 U.S. at 589. District courts must first determine whether the person whose testimony is offered is in
fact an expert, as codified in Rule 702 through “knowledge, skill, experience, training or education.” Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007) (citing Fed.R.Evid. 702).

Then, the district court must determine whether the expert's reasoning or methodology is reliable. Ervin, 492 F.3d at 904; see Kumho, 526 U.S. at 147. Specifically, the testimony must have a reliable basis in the knowledge and experience of the relevant discipline, Kumho, 526 U.S. at 149 (internal quotations removed), consisting of more than subjective belief or unsupported speculation. Daubert, 509 U.S. at 590.

Further, as to reliability, Daubert provided the following non-exhaustive list of relevant factors: “(1) whether the scientific theory can be or has been tested; (2) whether the theory has been subjected to peer review and publication; (3) whether the theory has been generally accepted in the scientific community.” Id. at 593–94). However, there is no requirement that courts rely on each factor, as the gatekeeping inquiry is flexible and must be “tied to the facts” of the particular case. Kumho, 526 U.S. at 150 (quoting Daubert, 509 U.S. at 591); see also Chapman, 297 F.3d at 687. Thus, the role of the court is to determine whether the expert is qualified in the relevant field and to examine the methodology the expert has used in reaching his or her conclusions. Kumho, 526 U.S. at 153.

The district court possesses “great latitude in determining not only how to measure the reliability of the proposed expert testimony but also whether the testimony is, in fact, reliable.” United States v. Pansier, 576 F.3d 726, 737 (7th Cir. 2009) (citing Jenkins v. Bartlett, 487 F.3d 482, 489 (7th Cir. 2007)). Accordingly, the court's
gatekeeping function requires focus on the expert's methodology; the “[s]oundness of
the factual underpinnings of the expert's analysis and the correctness of the expert's
conclusions based on that analysis are factual matters to be determined by the trier of
fact.” Smith, 215 F.3d at 718 (citing Daubert, 509 U.S. at 595; Walker, 208 F.3d at 587).

However, an expert must explain the methodologies and principles that support
his or her opinion; he or she cannot simply assert a “bottom line” conclusion. Metavante
Corp., 619 F.3d at 761 (quoting Minix v. Canarecci, 597 F.3d 824, 835 (7th Cir.2010)). In
demonstrating that an expert's testimony is reliable, a “plaintiff need not prove that the
expert is undisputably correct or that the expert's theory is generally accepted in the
scientific community.” Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1233 (10th Cir. 2004)
(internal quotation marks omitted). “Instead, [a] plaintiff must show that the method
employed by the expert in reaching the conclusion is scientifically sound and that the
opinion is based on facts which sufficiently satisfy Rule 702's reliability requirement.” Id.
(internal quotation marks omitted). But, “a court may conclude that there is simply too
great an analytical gap between the data and the opinion proffered.” General Elec. Co.
v. Joiner, 522 U.S. 136, 146 (1997)).

Lastly, the district court must consider whether the proposed testimony will
assist the trier of fact in its analysis of any issue relevant to the dispute. See Daubert,
509 U.S. at 592. It is crucial that the expert “testify to something more than what is
‘obvious to the layperson’ in order to be of any particular assistance to the jury.”
Dhillon v. Crown Controls Corp., 269 F.3d 865, 871 (7th Cir. 2001) (quoting Ancho v.
Pentek Corp., 157 F.3d 512, 519 (7th Cir. 1998)). However, the expert need not have an
opinion as to the ultimate issue requiring resolution to satisfy this condition. Smith, 215 F.3d at 718 (citing Walker, 208 F.3d at 587).

Resolution of an expert's credibility or the correctness of his or her theories under the particular circumstances of a given case is a factual inquiry, left to the jury's determination after opposing counsel has cross-examined the expert at issue as to the conclusions and facts underlying his or her opinion. Smith, 215 F.3d at 718 (citing Walker, 208 F.3d at 589–90). Thus, “[i]t is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound.” Smith, 215 F.3d at 718 (citing Kumho, 526 U.S. at 159 (Scalia, J., concurring) (stating that the trial court's function under Daubert is to exercise its discretion “to choose among reasonable means of excluding expertise that is fausse and science that is junky”)).

Moreover, when experts hold competing views in a jury case, it is solely for the jury to weigh and assess the credibility of dueling experts. See e.g. Valdez v. Ward, 219 F.3d 1222, 1238 (10th Cir. 2000) (determination of whose expert's “testimony at trial was more credible was an issue solely within the province of the jury”) (citing United States v. Bohle, 475 F.2d 872, 874 (2d Cir. 1973)); In re Joint E & S Dist. Asbestos Lit., 52 F.3d 1124, 1135 (2d Cir. 1995) (“Trial courts should not abrogate the jury's role in evaluating the evidence and the credibility of expert witnesses by simply choosing sides in the battle of the experts”) (internal quotation marks and alterations omitted); Kreppel v. Guttman Breast Diag. Inst., Inc., 2000 WL 369390, *3 (S.D.N.Y. April 11, 2000) (no
grounds for a new trial where “jury’s verdict indicates that the jurors assessed conflicting expert opinion and made a credibility determination that the analysis offered by [one expert] was more credible than that proffered by [another expert]” (citing Metromedia Co. v. Fugazy, 983 F.2d 350, 363 (2d Cir. 1992) (improper for district court to second-guess a jury’s credibility determinations)). Katt v. City of New York, 151 F. Supp. 2d 313, 351 (S.D.N.Y. 2001) aff’d in part sub nom. Krohn v. New York City Police Dep’t, 60 F. App’x 357 (2d Cir. 2003) and aff’d sub nom. Krohn v. New York City Police Dep’t, 372 F.3d 83 (2d Cir. 2004).

Daubert’s requirements of reliability and relevancy also apply in a bench trial, but “the usual concerns of the rule – keeping unreliable expert testimony from the jury – are not present in such a setting[.]” Metrovante Corp., 619 F.3d at 760. “It is not that evidence may be less reliable during a bench trial; it is that the court’s gatekeeping role is necessarily different.” In re Salem, 465 F.3d 767, 777 (7th Cir. 2006). “Nevertheless, the ‘court must provide more than just conclusory statements of admissibility or inadmissibility to show that it adequately performed its gatekeeping function.’” Id. (quoting Gayton v. McCoy, 593 F.3d 610, 616 (7th Cir. 2010)).

**Expert Testimony in PTSD and Brain Injury Cases**

Clearly, whether an expert will be able to testify on medical causation and/or extent of disability is determined expert by expert, on a case by case basis. However, some general rules apply. For example, although courts credit experts who meet with and examine plaintiffs (see Aldahe v. Matson Navigation Co., 2008 WL 659797, at *4 (E.D. Mich. Mar. 11, 2008)), an expert will not be excluded simply because his or her opinions are not based on firsthand knowledge or observation. Sementilli v. Trinidad Corp., 155 F.3d 1130, 1134-35 (9th Cir. 1998), as amended (Nov. 12, 1998). In Sementilli, the Ninth Circuit found that a district court abused its discretion in excluding a doctor’s opinion, despite the fact the doctor did not personally examine the plaintiff, was not personally present at the accident scene, and was not “privy” to the plaintiff’s thought processes just prior to the accident. Id. The court wrote:

Federal Rule of Evidence 703 allows an expert to base his or her opinions and inferences on facts and/or data “perceived by or made known to the expert at or before the hearing.” Fed.R.Evid. 703. Thus, as the Supreme Court has recognized: “Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.

Id. (citing Daubert, 509 U.S. at 592 (emphasis in original). As the Ninth Circuit held, a doctor may base his or her opinions on a review of the plaintiff’s medical records or other materials provided, as well as his or her knowledge, experience, training and education. Id.; see also Collins, 733 F. Supp. 2d at 700-01 (refusing to exclude opinions based on tests run and the reports generated by other doctors “with an eye towards litigation”).
However, where an expert’s methodology does not fit the facts of the case, he or she fails to consider other possible causes, fails to test his or her hypothesis in any meaningful way, reaches conclusions before doing any research, and/or cannot explain his or her opinion in any objective terms, the testimony will be excluded. *Downs v. Perstorp Components, Inc.*, 126 F. Supp. 2d 1090 (E.D. Tenn. 1999) (case involving a brain injury caused by alleged chemical exposure). In *Perstorp*, the proposed testimony of the plaintiff’s expert was excluded. *Id.* The court found that the expert’s opinion was based upon his subjective analysis and his determination, without any scientific basis, that all injuries which occur after exposure to a chemical compound must be causally related to and result from the individual's exposure to chemicals, and was, therefore, unreliable and inadmissible. *Id.* The expert extrapolated from one chemical compound to entirely different chemicals with no known common properties, and based his opinion on his experience with other chemical reactions. *Id.* He simply relied upon the fact that plaintiff was exposed as a causal connection for the resulting injury. *Id.* As a result, his testimony was excluded. *Id.*

One group of experts generally permitted to testify regarding medical causation and extent of disability are treating physicians. “Treating physicians commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis, and the extent of disability, if any, caused by the condition or injury.” *Levine v. Wyeth, Inc.*, 2010 WL 2612579, at *1 (M.D. Fla. June 25, 2010). Treating physicians may testify without a written expert report, but their testimony must be based on treatment of the

In Hair, the defendant argued that the plaintiff’s doctor should not be able to testify as an expert regarding the plaintiff’s mental condition because he was a doctor of internal medicine, not qualified in the area of mental health conditions. Hair, 2012 WL 4846999, at *12-13. According to the defendant, the doctor’s formal training in psychiatry was limited to a six week rotation in medical school. Id. Further, the doctor estimated only five percent of his practice was devoted to mental health conditions, and if a patient is “atypical” or “questionable” he referred them to a psychiatrist. Id. The defendant also challenged the reliability of the doctor’s expert opinions under Daubert, arguing that his opinions were not the product of reliable principles and methods. Id. Specifically, the defendant argued that the doctor’s diagnosis of PTSD was speculative and unsupported by reference to any treatise or other materials. Id. The Hair court rejected the defendant’s argument, finding that the doctor was qualified as an expert by his education and experience, which included his rotation in medical school, his training as a resident, and continuing education courses and seminars. Id. Additionally, the court credited the doctor’s testimony that there was a lack of mental health practitioners in the area of his practice, and therefore he was the primary resource for patients with mental health issues such as depression and PTSD. Id. The court permitted the doctor to testify as to opinions formed during the course of treating the plaintiff. Id.

Unlike treating physicians who are permitted to testify, based on treatment of a plaintiff, regarding causation and extent of disability, social workers are generally not
permitted to testify as experts on medical causation or the extent of disability. For instance, in United States v. Crosby, 713 F.2d 1066 (5th Cir. 1983), the Fifth Circuit upheld the trial court's decision to exclude a counselor with a masters degree in social work as an expert in the diagnosis of PTSD. The Fifth Circuit found that the trial court had properly concluded that "PTSD was a medical diagnosis which required professional ability [the counselor] did not possess." Id. at 1076–77.

Similarly, in Jackson v. Bayou Industries, 1995 WL 143538 at *1–2 (E.D.La. Mar. 29, 1995), the district court refused to permit a licensed professional counselor to render a PTSD diagnosis. The Jackson court noted that the counselor possessed a masters degree in psychology and had taken one formal course and one afternoon seminar in Diagnostic Statistical Manuals, but found that this training failed to adequately qualify her as an expert in the diagnosis of PTSD. Id.

Finally, in Lee v. National Railroad Passenger Corp. (Amtrak), 2012 WL 92363, at *2–3 (S.D.Miss. Jan. 11, 2012), the court held that a licensed social worker who had taken continuing education courses on PTSD nonetheless lacked the qualifications necessary to diagnose the plaintiff's mental condition. Although the social worker was currently treating approximately 10 other patients who reportedly suffered from PTSD, and had given at least five depositions regarding such patients, the court reasoned that "treating someone for PTSD is an altogether different matter than diagnosing it." Id. at *3; see also Hall v. United Ins. Co., 367 F.3d 1255, 1261 (11th Cir. 2004) (upholding trial court's exclusion of licensed professional counselor's testimony that decedent was incompetent, finding that the plaintiff had not shown that "counselors with similar
training are qualified to render an opinion as to an individual's mental capacity”); Carlson v. Banks, 2007 WL 5711692, at *11 (N.D.Ill. Feb. 2, 2007) (noting plaintiff's concession that PTSD was a medical diagnosis that licensed professional counselor was unqualified to make); Blackshear v. Werner Enters., Inc., 2005 WL 6011291, at *2–3 (E.D. Ky. May 19, 2005) (finding that licensed clinical social worker was not qualified to diagnose psychological disorders such as PTSD).

**Conclusion**

Maritime personal injury cases involving claims of PTSD and brain injury often turn on expert testimony regarding the diagnosis of the condition, its cause, and the extent of disability. Accordingly, lawyers handling such matters should be familiar with the law on admissibility of expert witness testimony generally, and in the PTSD and brain injury context specifically. Opinions of opposing experts should be probed to determine whether there is a basis for motions to exclude their testimony, and favorable expert testimony should be developed with an appreciation of admissibility standards.