

The Role and Impact of Police Practices Experts on Litigation

By Karen J. Kruger, Assistant Attorney General of Maryland, Baltimore

This article examines the role of expert testimony in police misconduct litigation. Police practices experts have become particularly conspicuous in cases alleging use of excessive force, and their participation in cases may fundamentally change the nature of the litigation. By virtue of their bearing the label of expert, their testimony and opinions tend to be particularly influential on juries. Expert testimony can alter the fact-finding process and be both "powerful and quite misleading."¹ Experts are afforded "extraordinary credence," and so it is essential for law enforcement managers and their attorneys to be cognizant of the legal and strategic issues that relate to relying on or defending against police practices experts.²

In police use-of-force litigation, there can be a proper role for a police practices expert, provided that expert and his or her methodology and opinions satisfy the applicable legal standards. An expert witness may be used either to offer an opinion based on his expertise or to present testimony that is factual in nature but relies on some specialized knowledge. Expert testimony and opinion evidence are admissible if that evidence is helpful to the jury.³ Generally, appropriate expert testimony relates to (1) the merits of a case, (2) causation issues, or (3) the amount of damages.

Expert testimony may be appropriate when specialized testimony is needed to prove an essential element of the claims that are being made. Examples of such instances include the question of the applicable standard of care, as in a negligence or professional malpractice action, or to address causation, especially matters such as complicated medical causation or the nature of the dangerousness of a product. But it is not appropriate for an expert to interpret facts that are within the understanding of the average juror; the purpose of his or her testimony should be to explain the evidence that is otherwise beyond the jury's "sphere of knowledge."⁴

Court evidentiary rules and case law allow the use of expert testimony, subject to certain criteria, and a court has broad discretion in deciding whether to allow an expert to testify. First, the court will consider whether expert testimony is appropriate on a particular subject that is involved in the litigation—that is, whether a witness with special expertise will actually help the jury interpret the facts of a case. The subject area about which the witness proposes to testify must be so distinctly related to some science, technique, occupation, or profession that without the expert's help the jurors could not understand the evidence or determine a fact in issue.⁵

A court should allow expert witness testimony only in cases in which the expert's credentials and expertise are clear and relevant.

Second, the court must evaluate the expert's credentials and determine whether he or she has true expertise in the identified subject area. A court should not permit the expert to testify unless the party offering the expert can lay a sufficient foundation to show that the expert is qualified and that his or her expertise really relates to the subject matter at issue in the case. The expertise may arise from the witness's knowledge, skill, experience, training, or education, but that expertise must be specific to the issues in the case.

Third, the expert's analysis of the subject matter must arise from a sound and generally accepted methodology that demonstrates that the analysis is reliable, including whether there is a sufficient factual basis in the record for the expert testimony. Unless the expert forms and bases his or her opinions on an

accepted or tested analytical approach, his or her opinions are not likely to be sufficiently reliable to be admissible. Similarly, if the opinion is without a reliable factual basis, it lacks validity.

Each of these aspects of the court's inquiry provide an opportunity for defense counsel to oppose the plaintiff's use of an expert witness in a police use of force lawsuit. Likewise, if in defending a suit, a law enforcement agency seeks to present a police practices expert, the agency must ensure that witness meets the criteria.

Does the Expert Testimony Fit?

In 1993 the Supreme Court decided *Daubert v. Merrell-Dow Pharmaceuticals Inc.*, which established revised standards for the admission of expert testimony in federal courts.⁶ Under *Daubert*, one standard is that an expert's testimony must be specialized in nature and relate directly to some fact at issue in the case. In other words, it must fit the case because "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."⁷ The *Daubert* Court noted that fitness is based on an examination of "helpfulness," a standard that requires a "valid connection" between the expert testimony and "the pertinent inquiry" in a case.

An example of a good fit, or a logical nexus with an issue in a case, is *Lawson v. Trowbridge*.⁸ In this case a police expert was permitted to explain to the jury that concealed weapons are particularly dangerous and to describe why officers must be specially trained to safely disarm persons who carry concealed knives. The expert had specialized knowledge about police training in defense tactics and so was qualified to testify about this particular aspect of police work.

In contrast, in *Berry v. City of Detroit* the appellate court examined the expertise of a law enforcement expert who had opined at trial that the agency's alleged failure to properly discipline its police officers adequately was the proximate cause of a fatal shooting.⁹ In that case, the court looked at this expert's background to determine whether his credentials qualified him to answer this specific question. Because the expert had no "firsthand familiarity" with disciplining officers and the impacts of a failure to discipline, the court found that his testimony should not have been admitted. Although he may have been a police expert of sorts, his expertise did not fit the specific issue in the case and so was not valid in that case.

Similarly, in *United States v. Hadden* the appellate court affirmed the decision of the trial court to not allow a defense expert in police practices to testify to his opinion that the arrest of the suspect was premature.¹⁰ The case involved a reverse sting operation, and the court determined that the proposed testimony "would not have assisted the jury in understanding the evidence or determining a fact in issue," so its exclusion of the expert testimony was appropriate.¹¹

Where an expert witness has no specialized knowledge of police practices in the locale in which the litigation is occurring, he is not properly qualified to offer an opinion about those practices. In *United States v. Hirschberg* a prosecution for mail fraud, the trial court would not allow a detective from Illinois offer an opinion about the way Miami detectives handled their investigative files because he had no knowledge of police practices in Miami, where the investigation occurred.¹² Essentially, the expert's testimony was irrelevant and did not fit the case.

The subject matter about which an expert may testify must also relate directly to some disputed fact involved in the case. Thus, in a case alleging constitutional violations, which is evaluated under the criteria of objective reasonableness, a court should not allow an expert to testify whether an officer was careless, since carelessness is evidence of negligence, not objective unreasonableness. The issue of negligence does not fit the applicable legal analysis. Expert testimony should not be presented unless it is valid to the disputed issues in the case and fits within the contours of the law of the case.

Accordingly, even if an expert has specialized or technical knowledge, if that knowledge does not closely and directly relate to an issue in the case that a jury needs help understanding, there is no fit. There is no need or role for expert testimony; it is irrelevant and should not be admitted.

Is the Expert Witness Really Qualified?

An expert witness is only helpful to the jury if he indeed possesses some type of unique knowledge-some expertise- that is beyond the common knowledge of jurors. The party offering the expert witness bears the burden of establishing his expertise and, in opposing such testimony, an effective level of inquiry must closely examine the qualifications of the expert.

An expert witness's qualifications may be based on academic credentials, specialized training, and particularized experience in a discrete field or profession. Typically, police practices experts rely heavily on their law enforcement experience by which to establish themselves as experts. Such experience is not regulated or influenced by intellectual or academic rigor, nor are there widely accepted professional standards against which to measure an expert.

The party offering the police practices expert must establish that the witness's training and experience qualify him or her to offer opinions within his or her field of expertise and that field must fit the case. Merely having years of experience in law enforcement does not make one an expert in all aspects of law enforcement. The question to be answered is whether the qualifications provide a foundation on which the expert can offer specific opinions, not whether he has expertise in the abstract sense.

In *United States v. Wright* the court allowed a detective to testify as an expert on the issues of drug trafficking patterns and practices in the community.¹³ The detective had testified to his "extensive experience and specialized training" and the court found that his background was sufficient to qualify him as an expert in the specific area in which the government offered him as a witness.¹⁴

The litigation of accidents often involves accident reconstruction, a field that one court has described as "more art than science."¹⁵ Experts in this field can sometimes be characterized as professional witnesses and may not have the specific and practical experience to be experts in a wide range of cases. For instance, a court did not permit an expert in the reconstruction of engineering accidents to give an opinion about the safety of a crane that had failed because, while the witness had sufficient academic credentials, he had no practical experience with cranes, had done no studies in the subject, and never even examined the particular crane or talked to the operator. Moreover, in previous cases, the expert had testified in an "extraordinary array of dissimilar fields," making him neither qualified nor reliable in the view of the court.¹⁶

The wise practitioner will carefully investigate the purported qualifications of the expert. Police practices experts offer nonscientific evidence and there are no established, standard criteria as to what qualifications are sufficient. Indeed, one court has noted "there is no such "field" as "police policies and practices."¹⁷

It is possible for a police practices expert, or any expert, to overstate his or her qualifications. For example, a claim that one has reviewed more than 500 police shooting cases should be subject to scrutiny. A review of an incident may range from actually being present at a scene and studying every aspect of a subsequent investigation to merely reading reports. If the expert's level of expertise relies heavily on his actual experience, the exact nature of that experience is crucial.

Because the technical parameters of police practices, to the extent that term even describes a recognized field of expertise, is broad, a police expert should be able to exhibit a specialty in that field. Police practices may include defensive tactics techniques, training, management, social interactions, interpretation of the

law, and more. It is unlikely that any one expert possesses expertise in all of these areas. The expert must be qualified in the specific subject matter presented in the case.

In presenting testimony or writing an expert report, the expert may easily stray into subject areas not within his expertise. For instance, in a case in which an expert on use of force relies on a videotape of a police-involved shooting, the expert may go on to talk about the technical aspects of the accuracy of the videotape. Careful questioning by counsel can serve to properly tailor and curtail the scope of the testimony to keep it within the specific area of expertise.

Competent counsel must explore all of these aspects of the expert's qualifications and the propriety of the subject matter and the relationship between the two. This exploration begins in the earliest stages of litigation with an extensive independent investigation into the expert's background and experience. Investigators should review other cases in which the expert has testified, using subpoenas if necessary to obtain prior reports and deposition transcripts. Subpoenas can also be used to secure academic and personnel records, as well as newspaper articles and television interviews. Attorneys should make carefully crafted discovery requests as provided for by court rules. All of these materials can be used to investigate the expert, his or her qualifications, and the exact nature of his or her purported expertise.

Does the Expert Use Reliable Methods?

The methods employed by the expert in reaching his opinion must be reliable and cannot be based on some standard or objective criteria. To challenge the methods of a proposed expert, one must carefully analyze both the approach used in the case at hand as well as that used in previous cases. The adequacy of the methods helps determine whether the expert's opinions have some objective value.

Not only must the expert's approach to the subject matter, and the subject matter itself, fit the case, but the expert's methods must also be sufficiently reliable in order for the opinion to be admissible. The reliability of the methods used is a question of law that the court must consider before allowing the expert to testify.

In conducting such a review, a court is evaluating whether the expert's opinion evidence is scientifically or technically valid, because it arises from a legitimate and generally accepted methodology. The court should determine whether the expert has applied the methods correctly, and whether the evidence actually supports the expert's conclusions.¹⁸ Those are questions for the jury.

The court will consider whether the methods used by the expert are consistent with the "intellectual rigor that characterizes the practice of an expert in the relevant field."¹⁹ The expert must have conducted his or her analysis "in the manner used by similar experts in [that] field" in order for his or her opinions to be admissible.²⁰ The court will make a judgment about the validity of the methods but not about whether the expert used or applied the method properly.

In *J.B. Hunt Transport Inc. v. General Motors Corp.* the court excluded the proposed expert testimony of an accident reconstructionist because his opinions were not scientifically valid.²¹ The opinions were premised primarily on photographs of scratches, and even he conceded that he had insufficient evidence to completely reconstruct the incident as he had theorized. There was a wide gap between the data and his opinion, and the court excluded the opinion.

Police practices opinion testimony is nonscientific in nature and is not ordered by any standard practices, analysis, or technology. It is not subject to peer review or testing. It does not arise from academic research. Thus, the methods of analysis and interpretation used by such experts should be strictly scrutinized. If the discipline itself lacks reliability, expert testimony in that discipline should not be admitted. The discipline of police practices is especially vulnerable to skepticism because it is without wide-ranging, widely

accepted standard practices of its own. Moreover, because of the unpredictability of police work, it is difficult, at best, to ever establish the propriety of standard police practices.

Because no single factor or feature of an expert's methods is dispositive of its reliability, the Supreme Court suggested several factors that trial courts should consider when reviewing the reliability of the expert's methods of analysis. These factors include whether the methods and principles used are testable, if there is a known error rate associated with the method, if the principles are subject to peer review, and whether the principles are generally accepted in the professional field.²² These factors coincide much more closely with scientific rather than nonscientific methods and are awkward to apply when dealing with expert testimony that is derived largely from individual perceptions and interpretations.

If an expert has unreasonably extrapolated from an accepted premise to an unfounded conclusion, the method of analysis is not reliable. If there are no established premises, the method is even weaker, and the resulting opinions may be without any merit whatsoever.

If the methods used by the police practices expert are solely his or her own and have no academic or empirical basis, his or her testimony may be further attacked as not reliable. Indeed, in some cases, the expert may not have any method at all but may use an ad hoc method that changes case by case. Some experts may claim to have a method, but investigation by opposing counsel may show that he or she does not consistently apply the method. Or there may be an analytical gap between the data and the opinion offered or between the opinion and the law that applies to the case.

Consider for example, a police shooting of a motorist that was captured on videotape. If the expert studies the case by repeatedly viewing the videotape in slow motion and frame-by-frame, his methodology runs counter to the admonition of *Graham v. Connor* that use-of-force cases not be analyzed with "20/20 hindsight." Thus, the method is not reliable in this type of case because it is not in accord with the applicable legal standard and is an analysis that really requires no expertise, since a reasonable juror could engage in the same analysis.

Therefore, a challenge to the reliability of the method can be threefold. One, there must be an examination of whether the expert's method of analysis really examines the factual issues in the case. Two, the party offering the expert must establish that the expert's methods were reliable and supported by appropriate validation. Because of the field of police practices is primarily experiential in nature, it is possible for counsel to argue that no methods can be reliable enough for use in court because there is no professional standard against which the methods can be measured and no consistency of methods used by professionals in the field.

Three, even if a court finds that the expert's method in the case was reliable, he or she may still be challenged for his failure to use the same method consistently. If an expert is not consistent in his approach, his credibility is also called into question. This is a matter that requires pretrial investigation into the testimonial opinions, expert reports, and review processes in other cases. Unless the expert can adequately explain why he departed from his usual methodology in analyzing the immediate case, his opinion is questionable, at best.

How Far-Reaching Is the Expert's Testimony?

Courts should limit the testimony of experts to three factual areas: an understanding of the meaning of facts that are technical in nature, specialized issues of causation and the impact of the events for purposes of evaluating damages. Since it is unlikely that a police practices expert would be called upon to opine about damages, the discussion below focuses on analyzing facts and the relationship between facts and the causes of injury.

If he or she is qualified and if his or her methods are reliable and fit the case, the testimony of a police practices expert may be helpful to a jury in understanding events that underline the claims if the events are so peculiar to law enforcement work that the significance of the events would be lost on the jury. For example, the typical juror is unlikely to know how a drug detection dog is trained and able to detect controlled dangerous substances. If this subject is a relevant and disputed fact in a case, it is appropriate for an expert to explain it, based on his or her own expertise and training.

Although less common, a police practices expert may legitimately testify about causation, if the question of causation is complicated and specific to law enforcement protocol. For instance, an expert in the methods of police vehicular pursuit may legitimately explain how the failure to adhere to the proper procedures might have caused an accident because most jurors do not themselves drive in high-speed pursuits. But the pursuit expert should not be allowed to opine about the culpability or intent of the officer who did not follow the proper methods, because that is a legal conclusion, not an explanation of a factual issue.

Likewise, a court should not allow a police practices expert to explain or define the law to the jury, or to apply the law to the facts and thus essentially tell the jury what result to reach. For instance, in a case alleging that an arrest was false because it lacked probable cause, the expert should not be permitted to either define probable cause or opine whether the events that occurred constituted probable cause. The judge is the expert on the law during a trial; it is his or her role to define probable cause, in this example. It is the role of the jury to apply the law to the facts, and thus to decide whether the circumstances of the underlying events constituted probable cause. There is no role for an expert in this situation.

Nor should a court allow an expert to tell the jury what the facts are or to opine about the credibility of witnesses. An expert report who opines that an officer's written report is "clearly contradicted" by other evidence (or the expert's interpretation of other evidence) is objectionable because it is a judgment about the truthfulness of the officers' reports. Although an attorney may argue in closing argument that the officers were not truthful, an expert witness should not be permitted to offer his personal opinion on that matter, as that is a task that must be undertaken by the jury. The expert's opinion of the credibility of witnesses is irrelevant, but, if allowed, could unduly influence the jury.

There is some debate whether a court should allow an expert to testify about so-called ultimate issues in a case. In challenging the scope of the testimony of a police practices expert, a useful approach is to argue that the testimony may not extend to ultimate legal issues, but only ultimate factual issues. For instance, in an excessive use of police force brought under federal civil rights statute, expert testimony as to the reasonableness of an officer's actions is only admissible to the extent that it would help the jury understand the evidence or determine facts at issue.²³ However, the court should not let the expert offer his conclusion on that issue, that is, whether the officer's conduct was objectively reasonable under the Fourth Amendment. The reasonableness of the use of force is the ultimate legal conclusion that the jury is called upon to determine in such a case and it is not helpful or appropriate for the expert to make that conclusion. The expert's testimony should be limited to explaining facts concerning how and why police officers use physical force and not to extend to the pronouncement of legal conclusions.

Conclusion

The testimony of an expert witness can be a powerful, effective, and expensive litigation tool. The proper role of expert testimony is a limited one. The expert must form an opinion by using valid methods about a question posed by the case. He or she must also be able to demonstrate that he or she is qualified to offer this specialized opinion and that it is helpful to the jury in understanding the evidence. An expert should not be permitted to evaluate the credibility of witnesses, or to opine about which evidence in the case is true. The expert should not draw conclusions of law or tell the jury what result to reach. And the expert should not be allowed to offer opinions that stray beyond his or her area of expertise.

In summary, a court should allow expert witness testimony only in cases in which the expert's credentials and expertise are clear. The expert's methods must be based on sufficient underlying factual data, his methods and principles must be reliable and he must have reliably applied the methods and principles to the underlying data. Finally, the testimony must be helpful to the court and the jury.

Expert witnesses have a special impact on trials, and it is appropriate that their testimony be scrutinized and limited.

Editor's note: Karen J. Kruger is an assistant attorney general of the state of Maryland and represents the Maryland Transportation Authority Police, a state law enforcement agency. The views expressed in this article are hers alone and not those of the Maryland attorney general or his staff. The author gratefully acknowledges the assistance of Richard R. Kuhn III in the preparation of this article.

¹ *Daubert v. Merrell-Dow Pharmaceuticals Inc.*, 509 U.S. 579, 595 (1993).

² *United States v. Buchanan*, 964 F.Supp. 533, 535 (D.Mass. 1997).

³ Walter R. Lancaster, *Expert Witnesses in Civil Trials* (West Publishing, 2003), sections 1.3 and 4.4.

⁴ Maury R. Olicker, "The Admissibility of Expert Witness Testimony: Time to Take the Final Leap," 42 U. Miami L. Rev. 831, 857 (1998).

⁵ Federal Rule of Evidence 702.

⁶ 509 U.S. 579 (1993).

⁷ *Id.* at 591, citing Weinstein & Berger, *Weinstein's Evidence*, section 702 (1998).

⁸ 153 F.3d 368 (7th Cir. 1998).

⁹ 25 F.3d 1342 (6th Cir. 1994).

¹⁰ 217 F.3d 841 (4th Cir. 2000) (unpublished).

¹¹ *Id.*

¹² 988 F.2d 1509, 1514, cert. denied, 510 U.S. 918 (7th Cir. 1993).

¹³ 26 Fed. Appx. 145 (4th Cir. 2001)(unpublished).

¹⁴ *Id.*

¹⁵ *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1174-75 (1st Cir. 1992).

¹⁶ *Id.*

¹⁷ *Id.* at 1352.

¹⁸ A. Roisman, "Surviving the *Daubert* Attack: Staying Focused," *The Practical Litigator*, vol. 14, no. 6 (November 2003): 44.

¹⁹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

²⁰ Roisman, "Surviving the *Daubert* Attack," 44.

²¹ 243 F. 3d 441, 444 (8th Cir. 2001).

²² 509 U.S. at 592-94.

²³ *Wells v. Smith*, 778 F. Supp. 7 (D. Md. 1991).

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