FINDING YOUR MEDICAL MAN: USING PSYCHOLOGICAL EVIDENCE IN CIVIL LITIGATION

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Social science in general, and psychological evidence in particular, have posed analytical and practical difficulties for courts attempting to apply Rule 702 and Daubert*. Notwithstanding these difficulties, however, social science testimony is an integral part of many cases, ranging from employment discrimination actions, to family law matters, to criminal proceedings. As such, whether it is hard to do or not, courts must apply the rules of evidence to these experts as faithfully as they can.*[1]

[I]nterior decorating is a rock hard science compared to psychology practiced by amateurs.[2]

I. Introduction

In the late 1940s, doctors began prescribing diethylstilbestrol (DES), a synthetic estrogen, to prevent miscarriages.[3] Decades later it was discovered that DES could injure the reproductive systems of daughters of women who had taken it.[4] In the late 1980s, one such daughter, Penelope Krist, sued DES manufacturer Eli Lilly and Company.[5] The daughter claimed that her mother took DES in 1948 while pregnant with her and that she was injured as a result. To prevail, the law required her to prove three things: (1) her mother took DES while pregnant; (2) DES caused the injury underlying her suit; and (3) Lilly "produced or marketed" the DES type (*e.g.,* color, shape, markings, size, or other identifiable characteristics) her mother took while pregnant.[6]

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1 United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996) (citations omitted).

2 Lee v. Weismann, 505 U.S. 577 (1992) (Scalia, J. dissenting).

3 Krist v. Eli Lilly & Co., 897 F.2d 293, 294 (7th Cir. 1990).

4 *Id.*

5 *Id.*

6 *Id.*

The parties exchanged discovery. Lilly deposed the elderly mother and, because her 1948 medical records were silent as to the type of DES she took, counsel asked her to describe the pills. With "serene confidence," the mother described red pills that resembled "M&M candy."[7] Lilly's counsel immediately advised plaintiff's counsel that Lilly had not manufactured *red* DES pills in 1948.[8] On the eve of trial, Lilly's counsel moved for and received summary judgment.[9]

The daughter appealed. Her counsel argued that summary judgment was inappropriate because he would have simply asked the jury to disbelieve the mother's testimony about the pills' color and that the jury might have done so. Judge Richard Posner, writing for the Seventh Circuit, met this argument with incredulity, asking: "How is the plaintiff to carry her burden of proof if the jury disbelieves her only witness? . . . How could the jury rationally conclude that she had gotten the color and coating wrong but the size, shape, and other features connecting the pill to Lilly right?"[10]

"There may be answers to these questions," Judge Posner posited, "but answers that come out of a scholarly literature of which the plaintiff's counsel appears to be unaware and which he, in any event, made no attempt to present through the affidavit of an expert who might later testify at the trial[.]"[11] Pointing to a significant body of psychological literature on memory's reliability, Judge Posner in dicta educated plaintiff's counsel on precisely what research and which types of experts he should have consulted.[12] The Seventh Circuit affirmed.[13]

This case illustrates, among other things, the need for personal injury litigators to evaluate whether psychology experts are required. Psychological evidence may bolster myriad case types, from personal injury cases involving traumatic brain injuries,[14] to Title VII sexual harassment cases,[15] to products liability cases.[16] This article (1) explores the history of the law's relationship with psychology, (2) details the evidentiary requests for the admissibility of psychological evidence, and (3) explores the various ways psychology may be woven into the litigation.

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 296.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 299.

[14] Bennett v. Richmond, 960 N.E.2d 782 (Ind. 2012).

[15] Smith v. South Ind. Mfg. Co., No. 3:04CV725, 2006 WL 2578979, at *1 (N.D. Ind. Sept. 5, 2006).

[16] Carroll v. Otis Elevator Co., 896 F.2d 210 (7th Cir. 1990).

II. The Gradual Development of Psychological Evidence in Jursprudence

Over the last two centuries, judges have grappled with social science evidence. Nineteenth century English courts were cognizant of the need for expert testimony in cases involving the insanity defense.[17] "Where an accused person is supposed to be insane," the theory went, "a medical man . . . may be asked, as a matter of science, whether the facts stated by the witness, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong."[18]

The American legal system warmed slowly to the discipline. In the early 1900s, Harvard University psychologist Hugo Munsterberg was one of the most significant advocates for the use of psychological evidence in legal proceedings. In his book, *On the Witness Stand*,[19] Munsterberg claimed that all disciplines but the law welcomed psychology's insight, but that

> [t]he lawyer alone is obdurate. The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made great strides.[20]

Munsterberg's book caught the attention of attorney and law professor Dean John Henry Wigmore.

Dean Wigmore published a satiric response in the *Illinois Law Review* titled "Professor Munsterberg and the Psychology of Testimony being a Re-

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17 United Kingdom House of Lords Decisions. (1843) *M'Naughten's Case*. UKHL J16 (19 June 1843). In 1843 London, McNaughton, a Scot, determined to assassinate the Tory prime minister, Sir Robert Peel. He went to the prime minister's home. He observed the prime minister's private secretary existing the residence. Mistaking the private secretary for the prime minister, he shot him in the back. A constable who witnessed the event arrested McNaughton. During his interrogation, McNaughton explained to police he acted in self-defense.

> The Tories in my native city have compelled me to do this. They follow me to France, into Scotland and all over to England. In fact, they follow me wherever I go . . . . They have accused me of crimes of which I am not guilty; they do everything in their power to harass and persecute me. In fact they wish to murder me.

McNaughton was indicted for willful murder and incarcerated. Because the English courts believed that "where an accused person is supposed to be sane, a medical man may be asked, as a matter of science, whether facts stated by the witness . . . show a state of mind incapable of distinguishing between right and wrong," the court heard evidence from nine medical doctors regarding the condition of McNaughton's mind. One of the doctors, Dr. Monro, had examined McNaughton in prison. He testified that McNaughton's persecution delusions were real and considered that the killing was committed under a delusion. When the Crown's own expert doctors concurred with Dr. Monro, employing phrases such as "homicidal mania" and "partial delusion," the prosecution's case buckled. The jury returned an insanity verdict. McNaughton was confined to an insane asylum for the remainder of his life.

18 *Id.* at 200.

19 Hugo Munsterberg, On the Witness Stand (1908).

20 Munsterberg at 10.

port of the Case of Cokestone v. Muensterberg."[21] The article purports to be a report of a libel action brought in "Windyville, Illiana," on April 1, 1908. In his opening, plaintiff's counsel identified his purpose: to defend the legal profession's honor because investigation of Munsterberg's allegations had proven that they were totally unfounded. What followed was a scathing cross-examination of "Professor Muensterberg," designed to illumine his premature introduction of an underdeveloped discipline into the law.[22] Heralding the day when lawyers and psychologists could advance in "a friendly and energetic alliance in the noble cause of justice," Wigmore declares that day was a long way off.[23] "When psychologists are ready for the courts," Wigmore pronounces, "the courts will be ready for psychologists."[24]

III. PSYCHOLOGICAL EVIDENCE IN THE AMERICAN COURTROOM

Since the days when the debate raged between Munsterberg and Wigmore, the the use of psychological evidence in American courtrooms has become common. Judges frequently admit psychological evidence provided it passes evidentiary muster. Attorneys who fail to evaluate whether expert psychological evidence is beneficial or (as in the DES case supra) even vital to a suit's strength, do so at their own peril. As a threshold matter, this requires a working understanding of the general and specific evidentiary paradigms governing psychological evidence.

A. GENERAL EVIDENTIARY CONSIDERATIONS

"Social science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply Rule 702 and *Daubert.*"[25] Despite these difficulties, "social science testimony is an integral part of many cases, ranging from employment discrimination actions, to family law matters, to criminal proceedings. As such, whether it is hard or not, courts must apply the rules of evidence to these experts as faithfully as they can."[26]

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21 John Henry Wigmore, *Professor Munsterberg and the Psychology of Testimony: Being a Report of the Case of* Cokestone v. Muensterberg, 3 ILL. L. REV. 399 (1909).

22 For an excellent discussion of Munsterberg and his run-in with Dean Wigmore, see Elis S. Magner, *Wigmore Confronts Munsterberg: Present Relevance of Classic Debate*. 13 SYD. L.R. 121.

23 WIGMORE, *supra* note 21, at 406.

24 JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF (1937).

25 United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996) (citing C. Robert Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-*Daubert *Era*, 2 VA. J. SOC. POL'Y & L. 211 (1995); David L. Faigman, *The Evidentiary Status of Social Science under* Daubert: *Is It "Scientific," "Technical," or "Other" Knowledge?*, 1 PSYCHOL. PUB. POL'Y & L. 960 (1995).

26 *Hall*, 93 F.3d at 1342.

1. *Daubert* and Social Science Evidence

The trial court is the gatekeeper for the admissibility of expert opinion evidence.[27] In federal court, the framework for assessing expert testimony is set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[28] *Daubert* applies to social science experts, including psychologists, just as it applies to experts in the hard sciences.[29] The measure of intellectual rigor, however, will vary by the field of expertise.[30]

Daubert addresses the application of Federal Rule of Evidence 702, which like Indiana Evidence Rule 702, permits qualified expert opinion testimony related to scientific, technical, or other specialized knowledge where such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."[31] Courts employ a three-step analysis to determine whether expert testimony is both relevant and reliable.[32] First, the witness must be qualified as an expert by knowledge, skill, experience, training, or education.[33] Second, the expert's reasoning and methodology underlying the testimony must be scientifically reliable.[34] Third, the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue.[35] "When opinions are excluded" on this third basis, "it is because they are unhelpful and therefore superfluous and a waste of time."[36]

Several factors are used in judging the reliability of an expert's reasoning and methodology: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known and potential rate for error; and (4) the "general acceptance" of the theory.[37] Where evidence is shaky but admissible, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden proof are the traditional and appropriate" means of attack.[38]

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27 Doe v. Shults-Lewis Child & Family Servs., Inc. 718 N.E.2d 738, 750 (Ind. 1999).

28 509 U.S. 579 (1993).

29 Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1996).

30 *Id.*

31 FED. R. EVID. 702; IND. EVID. R. 702(a).

32 Ervin v. Johnson & Johnson, 492 F.3d 901, 904 (7th Cir. 2007).

33 *Id.*

34 *Id.*

35 *Id.*

36 FED. R. EVID. 702 advisory committee's note citing 7 WIGMORE § 1918.

37 Bradley v. Brown, 42 F.3d 434, 437 (7th Cir. 1994) (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-94 (1993)).

38 *Id.*

2. Vulnerability of Psychological Evidence on Matters of Common Sense

Trial judges who analyze whether a psychological expert's testimony will "assist the trier of fact to understand the evidence or determine a fact in issue" may face a unique challenge. When it comes to psychological evidence, as the Seventh Circuit cautioned in *United States v. Hall*,

> [B]ecause the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise—a reliable body of genuine specialized knowledge—and something that is nothing more than fancy phases for common sense.[39]

This means that a party seeking to offer psychological expert testimony on an issue that smacks of common sense may find their expert challenged on the basis that she is offering testimony "within the jury's ken," or testimony that will not assist the trier of fact because it merely duplicates what everyone already knows.[40]

The plaintiff in *Carroll v. Otis Elevator Co.* faced this challenge. In 1985, the plaintiff, Ms. Carroll, was working as a department store clerk in Illinois.[41] While riding on the store escalator, an unidentified child pushed the escalator's bright red emergency stop button, causing the plaintiff to fall and injure her knee.[42] She sued the elevator's manufacturer, Otis Elevator Company[43] under a product liability theory. She specifically claimed that the escalator's "emergency stop button was unguarded and unreasonably attractive and operable by children."[44]

To support her theory, Shirley called an experimental psychologist. He opined:

> (1) Brightly colored red objects attract small children.
> (2) This particular button was a very vivid red.
> (3) Children can more easily access uncovered buttons than covered ones.

The jury found for the plaintiff. Otis appealed and argued the trial court abused its discretion in permitting the expert testimony both because he was unqualified to offer his opinion and because the subject of his testimony was outside the average juror's ken. The Seventh Circuit disagreed with Otis. Noting that the expert's "opinions were simple observations which re-

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39 United States v. Hall, 93 F.3d 1337, 1343 (7th Cir. 1996)

40 Carroll v. Otis Elevator, Co., 896 F. 2d 210 (7th Cir. 1990).

41 *Id.* at 211, 213.

42 *Id.* at 211.

43 *Id.*

44 *Id.* at 211.

quired their declarant to have only some limited understanding of a human's visual perception and manual dexterity," the court concluded that the expert, who specialized in visual perception, was qualified to testify as an expert.[45] The court continued,

> [w]hile it is true that one needn't be B.F. Skinner[46] to know that brightly colored objects are attractive to small children and that covered buttons or those with significant resistance are more difficult to actuate by little hands, given our liberal federal standard, the trial court was not "manifestly erroneous" in admitting this testimony and its judgment is accordingly affirmed.[47]

Concurring, Judge Easterbrook[48] noted:

> Perceptual psychology (a part of experimental psychology) is not junk science . . . [i]n principle, a product could be unreasonably dangerous because its designers neglected to consider how children see things. A specialist in vision, illusion, and reaction is just the sort of person to assist on such questions. The manufacturer [Otis] observes that expert testimony is inappropriate when the subject lies within the ken of laymen and insists that "everyone knows" red is attractive. Maybe, but much of the science of experimental psychology consists in demonstrating that what "everybody knows" is false. The world looks flat but isn't. Lots of other things deceive the eyes. The lines separating the squares don't look parallel, but they are.

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45 *Id.*

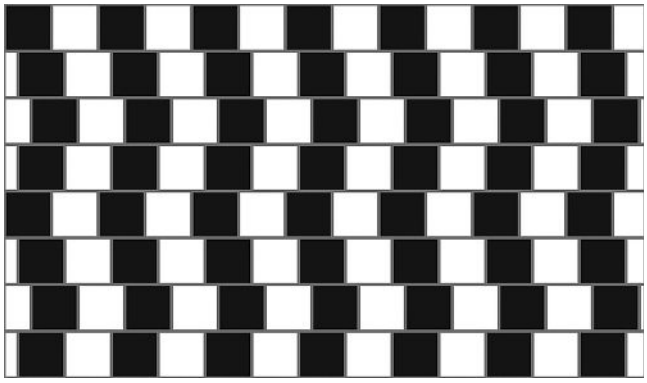
46 B.F. Skinner was a renowned American behavioral psychologist. L.D. SMITH, W.R. WOODWARD, B.F. SKINNER AND BEHAVIORISM IN AMERICAN CULTURE (Bethlehem, PA: Lehigh University Press 1996).

47 *Id.* at 212.

48 This opinion is well worth reading for Judge Easterbrook's thought-provoking discussion of industry design standards and products liability litigation.

> Today's case illustrates other difficulties in the imposition of liability for defectively-designed products. The escalator complied with all design standards in force at the time it was built. Why not treat this as conclusive—as more reliable (on average) than the opinions the legal system gives from hindsight? Now I'm acutely aware that building codes and even industry standards may reflect interest group politics or inattention to costs the industry does not bear rather than the best compromise between cost and safety, so that in principle Learned Hand was right to say that custom is no defense. There's that phrase again: in principle. Methods that can increase well-being when decision-makers have full information, and use it as trained social scientists would, may have quite different effects in our second-best world. Telling juries that compliance with codes and standards does not count invites them to apply hindsight and to favor the interests of visible victims over invisible losers—those who must pay higher prices, who will be deprived of beneficial products, or who will be injured in turn if manufacturers change their designs to be jury-proof. Imperfect as they are, the incentives of department stores to acquire (and engineers to design) safe escalators work better than the alternatives the legal system can offer.

Id. (internal citations omitted).



> That Otis does not consult psychologists when designing emergency buttons, which it thinks an impenetrable obstacle to expert testimony on the point, may show only why its design came to be dangerous.

A challenge to psychological testimony on the basis that it covers commonsense matters is a viable theory; however, its success is limited.

3. A Brief Note on *Daubert* and Indiana Evidence Rule 702

Rule 702 of Indiana's Rules of Evidence mandates that "expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."[49] The federal rule is somewhat different, allowing expert testimony based on "scientific, technical, or other specialized knowledge" only 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 case's facts."[50] Although *Daubert* does not bind Indiana courts, the concerns driving *Daubert* coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied with the reliability of the scientific principles involved.[51] Indiana courts will consider the *Daubert* factors in determining reliability, but there is no specific test that must be considered in order to satisfy Indiana Evidence Rule 702(b).[52] *Daubert* is helpful, not controlling.[53] Indiana's Rule 702 is not intended to "interpose an unnecessarily burdensome procedure or methodol-

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49 IND. EVID. R. 702(b).

50 FED. R. EVID. 702(b); *see* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (extending the *Daubert* reliability analysis beyond "scientific" testimony to testimony based on "technical" or "other specialized" knowledge).

51 Turner v. State, 953 N.E.2d 1039, 1050 (Ind. 2011) (citing Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003)).

52 *Id.* at 1050.

53 *Id.*

ogy for trial courts."[54] Rather, it was adopted to liberalize rather than constrict, the admission of reliable scientific evidence."[55] Indiana courts, when analyzing the admissibility of psychological evidence, often do so through a *Daubert* lens. Even civil litigators with an exclusive state court practice should make themselves familiar with that federal opinion.[56]

B. EVIDENTIARY CONSIDERATIONS FOR PSYCHOLOGY SUBFIELDS

1. Subfield Descriptions

Psychology comprises several subfields. Indiana does not recognize specialty certification, although psychologists seeking to become certified may do so through independent organizations. The American Psychiatric Association (APA) recognizes several subfields.[57]

- *Clinical Psychology:* Clinical psychologists assess and treat mental, emotional, and behavioral health disorders. They would generally be called to testify in a case when they have treated one of the parties to the litigation.
- *Developmental Psychology*: Developmental psychologists study the psychological development of the human being throughout life.
- *Forensic Psychology*: Forensic psychologists apply psychological principles to legal issues. They can perform custody evaluations, evaluate a defendant's competence to stand trial, and also conduct research on jury behavior or eyewitness testimony.
- *Neuropsychology*: Neuropsychologists (and behavioral neuropsychologists) explore the relationships between brain systems and behavior. For example, behavioral neuropsychologists may study the way the brain creates and stores memories or how various diseases and injuries of the brain affect emotion, perception, and behavior. They design tasks to study normal brain functions with imaging techniques such as positron emission tomography (PET), single photon emission computed tomography (SPECT), and functional magnetic resonance imaging (fMRI).
- *Social Psychology*: Social psychologists study how a person's mental life and behavior are shaped by interactions with other people.

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54 *Id.*

55 *Id.*

56 *See, e.g.*, Bennett v. Richmond, 960 N.E.2d 782 (Ind. 2012).

57 www.apa.org/careers/resources/guides/careers.aspx

- *Experimental Psychology*: Experimental psychologists are interested in a wide range of psychological phenomena, including cognitive processes, comparative psychology (cross-species comparisons), and learning and conditioning. They study both human and nonhuman species with respect to their abilities to detect what is happening in a particular environment and to acquire and maintain responses to what is happening.

While attorneys need not have an in-depth knowledge of each subfield, an understanding of them is helpful when an attorney is determining whether psychological evidence may assist the finder of fact. A developmental psychologist specializing in children may not be the best fit for a case involving a traumatic brain injury—and will almost certainly be subject to an evidentiary challenge. Likewise, an experimental psychologist is likely a poor choice to perform a custody evaluation.

2. Indiana Supreme Court Guidance on Psychological Evidence

The Indiana Supreme Court has offered helpful guidance on the use of psychological evidence.

a. *Traumatic brain cases and psychologists*

In a 2012 Indiana case, the Supreme Court found that a psychologist may testify to the existence of a brain injury or to the brain's condition in general if she fulfills the requirements of Rule 702.[58] Whether that same psychologist may testify as to the cause of a brain injury is a more complex question that has divided jurisdictions.[59]

In *Bennett v. Richmond*, the Supreme Court was asked to decide whether a psychologist could offer an opinion on the cause of a traumatic brain injury. That case began when Bennett rear-ended Richmond's van with his truck. The van driver sued, claiming damages for an injured neck and back. On his attorney's recommendation, the van driver went for a neuropsychological evaluation with a psychologist. The psychologist reviewed his medical records and deposition, performed a physical examination, and diagnosed a traumatic brain injury (TBI). Bennett, the truck driver, sought to exclude the psychologist's testimony at trial, arguing that because the psychologist was neither a medical doctor nor a neuropsychologist, he was unqualified to opine about the TBI's cause. Specifically, he argued that the psychologist was not qualified under Rule 702 to diagnose the brain injury's cause. The trial court disagreed and allowed the psychologist to testify. The jury ruled in the van driver's favor. Bennett appealed and the Indiana Supreme Court granted transfer.

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[58] *Bennett*, 960 N.E.2d at 784-85.

[59] *Id.*

The Supreme Court affirmed the trial court's ruling. Noting that the issue whether a psychologist could diagnose a brain injury was divisive, the Court determined to take a commonsense approach to the issue. It first reviewed the psychologist's credentials.

> With regard to his qualifications, Dr. McCabe obtained a Masters degree in General Psychology in 1956 and a Ph.D. in Counseling Psychology in 1958. He taught in the psychology department at the University of Portland from 1958 to 1967 and taught courses in performing psychological assessments at the University of Notre Dame from 1967-1997. Dr. McCabe served as a psychological consultant for Elkhart General Hospital. He has been in clinical practice since 1981, in which he primarily performs psychological assessments. He has continued his education by attending professional workshops specializing in forensic applications of psychology, which "touched on subjects that relate to evaluation of traumatic brain injuries." Appellant's App. 69. Dr. McCabe also testified that he has had patients referred to him by medical doctors. Specifically, two neurologists referred cases to him for "specific aspects of brain behavior relationship questions," and other general practitioners referred cases to him for insight into the "relationship between the presenting psychological problems and . . . underlying medical issues."[60]

Next, the Court reviewed his methodology.

> Dr. McCabe also thoroughly described the methodology he used to reach his conclusion that the accident caused Richmond's *brain injury*. He interviewed both Richmond and his wife, reviewed both Richmond's medical records and deposition, and conducted a series of tests. Dr. McCabe drew conclusions from each of the tests he performed on Richmond. From the Wechsler Adult Intelligence Scale–III, which he explained was a "widely used test, almost universal" and "very good from a scientific point of view," he noted a disparity between Richmond's verbal and performance tests that he attributed to "some sort of interference with his cognitive processing that [he called] kind of cognitive inefficiency." From the Wechsler Memory Scale, "another widely used clinical memory test," Dr. McCabe also noted a pattern of discrepancy or inefficiency that led him to conclude that there were "difficulties . . . getting in the way of [Richmond's] smooth memory function." Lastly, from the Halstead Neuropsychological Test Battery, again "a very widely used battery," Dr. McCabe concluded that Rich-

60 *Id.* at 787 (internal citations omitted).

> mond's impairment index suggested that he had "mild to moderate brain damage."[61]

The Court concluded, in light of the psychologist's training and credentials, that he was qualified to offer an opinion on a brain injury case.

> Rule 702 requires that Dr. McCabe demonstrate his knowledge, skill, experience, training, or education in order to be qualified as an expert, and in fact, only one of these characteristics is necessary. Even if we were to conclude that Dr. McCabe had not had any specific "education or training relevant to determining the etiology of brain injuries," he clearly demonstrated his knowledge of how a brain injury might result from the whiplash motion experienced in a rear-ending accident, how such a brain injury results in symptoms similar to those experienced by Richmond, and how psychological and neuropsychological testing reveals the relationship between that brain injury and behavior. He further testified to his experience in working with trained medical doctors on issues related to "brain behavior relationship questions" or the "relationship between the presenting psychological problems and . . . underlying medical issues." To the extent that Dr. McCabe (1) has had no real "education or training relevant to determining the etiology of brain injuries" or took continuing education courses that only "'touched on subjects that relate to evaluation of traumatic brain injuries,'" (2) has worked with a limited number of neurologists on brain behavior relationship questions, (3) evaluated Richmond almost two-and-a-half years after the accident, or (4) did not have any baseline data for which to compare Richmond's results, these matters go to the weight and credibility of his testimony, not to his qualification to give it.[62]

The current law in Indiana is that a psychologist may diagnose a brain injury given proper credentials and scientifically reliable methodology.

b. *Civil assault & battery and organizational psychologists*

The Indiana Supreme Court has also reviewed whether an organizational psychologist may diagnose someone as a "workplace bully" in a civil lawsuit premised on assault and battery.

In *Raess v. Doescher*,[63] a perfusionist (heart equipment operator) sued a heart surgeon for assault and intentional infliction of emotional distress following an altercation in the open-heart surgery area. The surgeon, angry at

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61 *Id.* (internal citations omitted).

62 *Id.* at 789 (internal citations omitted).

63 883 N.E.2d 790 (Ind. 2008).

the perfusionist who had reported to hospital administration about the surgeon's treatment of other perfusionists, "aggressively and rapidly advanced on" the perfusionist with "clenched fists, piercing eyes, beet red face, and popping veins" while screaming and swearing.[64] The perfusionist backed up against the wall, believing the surgeon was going to hit him. The surgeon walked away, momentarily stopping to declare "you're finished, you're history."

The perfusionist sued the surgeon. At trial, he introduced testimony from an organizational psychologist, who diagnosed the surgeon as a workplace bully. The psychologist testified: "I concluded that based on what I heard and what I read that [the defendant] is a workplace abuser, a person who subjected [the plaintiff] to an abusive work environment. It was a horrific day, it was [a] particularly aggregous [*sic*], outrageous . . . episode."[65] Although the Supreme Court ultimately determined the defense had waived its challenge to the psychologists testimony on appeal, the case illustrates the unique ways psychological evidence presents in Indiana courtrooms.

c. *Childhood sexual assault lawsuits and clinical psychologists*

The Indiana Supreme Court has examined the use of psychological evidence of repressed memories in civil lawsuits based on sexual assault allegations.

In *Doe v. Shults-Lewis Child & Family Services, Inc.*,[66] plaintiff sued a nonprofit organization that ran a group home, claiming that she was sexually assaulted as a child while in the home's care. The nonprofit moved for summary judgment, arguing the applicable statute of limitations barred the action. The plaintiff responded that she had repressed the memories of the abuse and that the nonprofit fraudulently concealed it. In support of her repressed memory claim, the plaintiff offered the affidavit of a clinical psychologist. The psychologist opined that the plaintiff had repressed all memory of childhood abuse based on his interview with her and his analysis of the Minnesota Multiphasic Personality Inventory she took. The nonprofit challenged the affidavit, claiming the psychologist's methods were not premised on reliable scientific principles. Disagreeing, the Supreme Court noted,

> [w]e must analyze the [psychologist's] affidavit to determine if it provides the court with more than a bald conclusion based on admissible facts, and we find that it does. [The psychologist] based his opinion that [the plaintiff] had repressed memory of the tortious conduct on his interview with her, his personal experience with survivors of childhood sexual abuse, and the Minnesota Mul-

64 *Id.* at 794.

65 *Id.*

66 718 N.E.2d 730 (Ind. 1999).

> tiphasic Personality Inventory (MMPI). Through his experience with his patients and his reading on the subject, he developed a list of symptoms or traits commonly shared by those who repress memories of childhood sexual abuse. He applied these factors to [plaintiff], and found that she had repressed her memories. He analyzed the results of [plaintiff's] MMPI and found that she registered high on the repression subindex. The underlying methodologies and reasons informing [the psychologist's] opinion were adequately expressed. This affidavit therefore raised a genuine issue of material fact regarding the validity of the phenomenon of repressed memory and whether [the plaintiff] actually repressed memories of childhood sexual abuse, and summary judgment was inappropriate on this basis.[67]

This case, and the cases detailed supra, demonstrate the in-depth inquiry courts make when analyzing these issues. Litigators should retain experts with strong credentials, should understand their methodology, and should be prepared to defend their experts when faced with an evidentiary challenge.

IV. CONCLUSION

Given the increasing use of psychological evidence in the courtroom, successful civil litigators must understand how to use psychologists to strengthen their cases. By finding the right medical man and understanding the evidentiary burdens accompanying the admission of psychological evidence, attorneys may increase the chances of a successful result for their clients and avoid being the target of a lecture similar to the one Judge Posner delivered to the plaintiff's attorney in the DES case mentioned at the beginning of this article.

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[67] *Id.*