[IMAGE]

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Crash Test Researcher Barred From Testifying in Auto Accident

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In a surprising upset for the defense, a plaintiff claiming a cervical straining injury from a sideswipe accident was awarded $330,000 in damages in a Texas court in February 1997. The defense had hired Whitman McConnell, MD of Biodynamics Research Corporation of San Antonio, Texas to serve as an accident reconstructionist. You may be familiar with that name: he was the principal researcher in two of the most recent and most heavily cited low speed rear impact crash tests.[1,2] (I've discussed these papers in depth elsewhere.)[3,4]

The defense strategy was derailed by the plaintiff's lawyer who argued against the admissibility of McConnell's testimony under a 1995 Texas Supreme Court ruling (E.I. du Pont Nemours vs. Robinson, 923 S.W.2d 549), which established a six-part threshold test for trial judges to determine the admissibility of expert testimony. The high court ruling, in turn, adopted the federal court ruling in the high profile case of Daubert vs. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579. In that case, you may recall, Dow argued that no clear scientific evidence linking silicone leakage from breast implants and the various diseases claimed by the plaintiff had been documented, and that the plaintiff relied heavily on junk science to promote her case.

In the Robinson case, a horticulturist named Whitcomb was hired as an expert to testify that a fungicide called Benlate had become contaminated (at DuPont during the manufacturing process) with other substances, and that it had subsequently damaged Robinson's pecan trees. Whitcomb visually inspected most of the trees, examined some roots, and then concluded, employing a method referred to as "comparative symptomatology," that the allegedly contaminated Benlate had been the culprit. He did not perform any special soil tests, nor did he analyze the remaining fungicide that was still in Robinson's possession.

Dr. Whitcomb had several relevant college degrees and had written numerous books and articles on horticultural topics, but after deposing Dr. Whitcomb, du Pont filed a motion to exclude his testimony, alleging that his opinions were speculative and not reliable. The trial court held a pretrial hearing on du Pont's motion and found in du Pont's favor on the following points. Dr. Whitcomb's testimony, they said:

1. was not grounded upon careful scientific methods and procedures;
2. was not shown to be derived by scientific methods or supported by appropriate validation;
3. was not based on scientifically valid reasoning and methodology;
4. was not shown to have a reliable basis in the knowledge and the experience of his discipline (horticulture in this case);
5. was not based on theories and techniques that had been subjected to peer review and publication;
6. was essentially subjective belief and unsupported speculation;
7. was not based on theories and techniques that the relevant scientific community had generally accepted; and
8. was not based on a procedure reasonably relied upon by experts in the field.

The basis for invoking Robinson in the sideswipe case involving Dr. McConnell was that Dr. McConnell had not performed any mathematical calculations and that he had not practiced medicine since 1989. Several other plaintiff attorneys have successfully used Robinson in similar cases in Texas recently.

Although some attorneys dismiss the other cases where expert accident reconstruction/biomechanical engineering testimony has been disallowed merely as flukes, others believe the Robinson ruling marks a watershed event in personal injury law and that it will pose a serious problem for insurance companies that are increasingly relying upon biomechanical and accident reconstruction analyses in low speed auto accidents, particularly rear-enders. It is reported that the routine analyses cost the carriers from $4000 to $7000 apiece.

Whatever the long-term impact of the Robinson decision on expert testimony may be, it is clear that lawmakers are genuinely interested in removing junk science from the courtroom and that academic credentials and research experience will not exempt the experts from close scrutiny by judges. And that will be to the distinct advantage of those genuinely injured in auto accidents, as well as those at risk for injury in the future. True science, after all, has always demonstrated that whiplash injury is a very real public health hazard. It's now known to result in approximately 1-1.5 million new chronic pain sufferers and

approximately 200,000-300,000 disabled Americans each year. And it should rightfully be taken seriously, both from a clinical standpoint, and a crash prevention and crashworthiness standpoint.

Although not without value, most of the more recent crash testing literature and some of the epidemiological literature on whiplash bears an unmistakable fiscal inspiration, while providing a suspiciously dependable industrial utility for its sponsors. The shortcomings and flaws of this work are rarely acknowledged by the authors. The crash testing and seriously flawed outcome/guidelines "research" relied upon most frequently by insurance companies, in fact, was financed directly by them with goals, one can only surmise, that are quite apart from the otherwise praiseworthy goal of the advancement of our science.

With a little help, perhaps from Robinson or other unlikely quarters, this dubious work will finally find its deserved state of equilibrium in the general pool of scientific literature: interesting, but not earth-shaking, and certainly not prefect. And perhaps then doctors can go about the business of treating injured people; perhaps, too, legislators will listen more carefully to proposals for intelligent vehicle/highway systems which promise to reduce the number of accidents. Perhaps then, engineers can go about the business of making our vehicles more crashworthy at low speeds so we can reduce the number of injuries and disabilities arising from low speed accidents. Just a thought.

References

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