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Testimony Traces in Appellate Review: Expertise Extension in Cases of Domestic Abuse and Eyewitness Identification

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ABSTRACT: Appellate rulings contribute to policy deliberations on uses of and parameters for expert testimony. As courts perform gatekeeping and evaluative roles, opinions highlight investigative independence, calculations of probability, and consistency across studies. Even so, the elements from expert testimony most commonly extended into precedent stand out for their summative concision and figurative cogency.

KEYWORDS: expert testimony, expertise extension, figurative cogency, battered women’s syndrome, eyewitness reliability.

1. INTRODUCTION

Testimony in court by victims of domestic abuse often is supplemented by expert testimony that modifies and supersedes a victim’s voice (Hamilton, 2010). Expert testimony also serves as an interpretive filter and evaluative caution when a jury evaluates the reliability of eyewitness testimony (Terrance, Thayer, & Kehn, 2006; Cutler, Dexter, & Penrod, 1989). In both instances, the testimony introduces and explains criteria that a jury and judge use to understand, and at times reject, other testimony at trial. In some circumstances, attorneys also strategically use expert testimony to convey a defendant’s point of view while avoiding cross-examination (Miller, 2003). Given these uses of external expertise in trials, often to filter and qualify factual accounts, the conditions under which such testimony is admitted, presented, and interpreted is a matter of significant interest.

Several factors influence procedural decisions on whether a court admits the testimony of an external expert on a given subject in a particular trial: policy preferences, role of requesting party, criteria used for evidentiary review, legal sub-domain, type of expertise, degree of consensus about a social problem and the sufficiency of existing legal solutions (Harris, 2008; Buchman, 2007). Less has been written, however, about the process in particular legal domains by which that expertise incrementally is naturalized. This essay uses the ideas of transmutation and adoption to describe a process by which knowledge and recommendations derived from a particular expertise are actively imported and incrementally reified. The analysis suggests that domain elaboration in legal sub-fields is solidified in a process of transmutation that distills elements with figurative cogency from expert narratives.
2. EXPERTISE EXTENSION IN DYNAMIC LEGAL FIELDS

The case opinions analyzed in this study all evaluated uses of expert testimony to frame understandings of fact. Some cases cited expert testimony explicitly to revise a legal standard (State v. Henderson, 2011). In others, the original and declared purpose for the testimony was to make factual determinations in the case (State v. Haines, 2006; People v. Midyette, 2011). Nonetheless, as this analysis shows, even in those cases, the use of that testimony subtly developed elaborations and applications of legal doctrine. The expert testimony was interpreted and adopted in ways that developed law.

The sample consists primarily of two types of cases: (1) ones that involved allegations of domestic abuse, a subject matter concerning which courts and some legislatures increasingly have enshrined a right at trial to expert psychological testimony, and (2) cases in which eyewitness observations may have been contaminated by inappropriately suggestive line-up procedures or other reliability-decreasing factors. These two types of cases give the sample a limited and symmetrical diversity, particularly since the common exclusion at trial of expert testimony concerning suggestive line-up techniques typically benefits the prosecution, while the increasingly guaranteed right to call expert psychological testimony in cases of alleged battering benefits the defense, especially for the particular charge that generated public support for a statutory right to expert testimony, where a battery victim is charged with a crime against her abuser. Not only do these two types of cases reflect on the one hand a restrictive, and on the other a lighter, admission threshold for expert testimony, they also reflect tendencies in which the testimony carries different advantages for the prosecution and defense. As a whole, the sample shows distinctive proclivities in how expert testimony has been adopted into and transformed for legal understandings.

The study uses primarily three cases in which appellate courts ruled on matters of expert testimony. One modified the legal standard by which factors that reduce eyewitness reliability can be identified and mitigated (State v. Henderson, 2011). The original trial court convicted Larry Henderson of reckless manslaughter and aggravated assault, based primarily on his identification by James Womble, an eyewitness. The trial court allowed Womble’s testimony, based on a pre-trial hearing in which it found the police officers had not been “impermissibly suggestive,” even though Womble said in that hearing that the investigators had strongly “nudged” him to make a choice from a photo line-up of possible suspects. An appellate court reversed that ruling and, showing some uncertainty, requested certification of that decision from the state supreme court. The high court heard arguments from third parties that “raised questions about possible shortcomings in the [legal standard used].” As a result, the state supreme court appointed a Special Master to “evaluate the scientific and other evidence about eyewitness identifications” (p. 2). This testimony, summarized in a separate report and recounted at length in the court’s subsequent opinion, focused not on matters of fact decided by the trial court, but instead on the validity of the legal standard used to determine the reliability of eye-witness testimony. Based on the scientific evidence and expert testimony, the court recommended a revision of the law governing eye witness identifications.

In People v. Midyette (2011), the defense called Dr. Lenore Walker, a widely-cited social scientist whose work first identified and documented Battered Women’s Syndrome (BWS), for the purpose of showing that the defendant suffered from the syndrome, which may have contributed to her ineffective defense at trial. The expert testimony thus was not presented at the original trial, but instead on appeal at the district court, where the defendant argued that the testimony might effectively have been presented earlier, but for her emotional
and cognitive incompetence at that time. In this case, the district court allowed and heard the expert testimony, which it eventually found unpersuasive. The opinion included an explanation, offered by the district court, as to why the expert testimony was not persuasive.

In the third case, Ohio v. Haines (2006), the Ohio Supreme Court reversed convictions for some domestic assault charges, while leaving other assault convictions intact. The court let stand the trial court’s decision to allow expert testimony on BWS, but under the condition that the testimony address only the issue of social framework. The court found irreparable prejudice introduced when the expert presented at trial also a diagnostic opinion that the abuse victim suffered from BWS. According to the court, that diagnosis implied the alleged crimes had been committed and intruded on the jury’s fact-finding responsibility.

Finally, the study draws on multiple-cases analyses by Melissa Hamilton, Julie Stubbs, and Julia Tolmie, which place the use of expert testimony on domestic abuse within an evolving and dynamic context. Stubbs and Tolmie (1999) focused narrowly on the use of BWS testimony on behalf of defendants accused of murder or assault. In other words, they did not consider the testimony as used in prosecutions against the men perpetrating the abuse. Even in that limited context, however, they saw a developmental trajectory in Canadian and U.S. law, though it had not yet developed that way in Australian courts. In particular, they noted that expert testimony increasingly was used not just as evidence of a qualifying social framework, but also as a means for assessing responses by the abused women as plausible and “reasonable” defensive actions.

Hamilton focused on a presumably later stage of development in that general domain. She analyzed judicial uses of expert testimony in sixty-two appellate opinions presented in California between 1996 and 2004, particularly those in which the expert testimony was admitted “under a special evidentiary statute in a prosecution of a male abusing his female partner” (Hamilton, 2009, p. 61). California was unusual at that time for this type of testimony since in 1990 its legislature broadly guaranteed admission of such testimony in all domestic violence cases. While legislatures in other states authorized such testimony only as part of a defense by a woman accused of murdering her abuser—and appellate courts in other states used case law to allow testimony through case law (e.g., State v. Koss, 1990)—California was the first state to change evidence law to allow such expert testimony for all cases in which domestic abuse was alleged. Hamilton’s data sample of such testimony use documents the evolving relationship between the testimony and changing legal standards.

3. PRESENTATION AND EXAMINATION OF TRANSMUTED EXPERTISE

In order to give effectiveness to knowledge, people possessing specialized expertise testify in courts of law about scientific theories, patterns of behavior, and occasionally to justify medical diagnoses. In doing this, designated experts endeavor to make a kind of translation. Things that may be understood and discussed in one way among other experts of the same domain, perhaps more exactly, perhaps more technically, are presented in a court of law in such a way that ordinary non-specialists, primarily judges, lawyers, and members of a jury can understand and accept the primary claims. This act of translation requires all parties involved, the experts and non-experts, to find a middle ground, where some shared standards of validity can be applied to the matters in question. The parties must speak in an intermodal language that realizes, as Hans-Georg Gadamer put it, a “fusion” of linguistic and evaluative horizons (1997, p. 302). As the following analysis shows, the dimensions of expert testimony that broadly explain the
acceptance and uses of expertise in the sample opinions are allusions to professional consensus, selective indices of methodological validity, and illustrations of political and figurative cogency.

3.1 Criterion of General Acceptance

A common measure for admitting expert testimony is the prevalence of consensus among specialists. Insofar as a party or witness can show unanimity of opinion within a scientific or technical community, then the court generally may accede to the presentation of that evidence, that is, if the testimony also meets other criteria for admissibility, such as usefulness to the jury and relevance to one of the legal questions being considered. In one sense, this focus on possible scientific consensus is a legacy of the so-called Frye (1923) or “general acceptance” standard. It also may reflect a developmental model of scientific inquiry, alluded to by Harry Collins and Robert Evans (2007) in the distinction between disputed and consensual science (pp. 20–21). Thomas Kuhn’s well-known account of paradigm shifts in the development of science similarly reinforces this notion that divisions created by a revolutionary paradigm shift are eventually subsumed again in a newly stable comprehensive theory (1996). The criterion of unanimity serves the court as a sign of scientific validity and maturity.

The bane of a disputed science also has been used to disqualify marginal knowledge claims at the point of accepting or rejecting possible expert testimony. In the original Frye case, the District of Columbia Court of Appeals upheld the trial court’s exclusion of testimony by which an expert offered to explain how a blood pressure test could be used to detect truth and lies. The criterion used to exclude that testimony in Frye (1923), and increasingly cited for that purpose since the 1970s, was that the scientific principle or discovery used as a basis for a deduction should be “sufficiently established to have gained general acceptance in the particular field in which it belongs” (as cited in Lyons, 1997, para. 4).

Following that prevailing Frye standard for admitting expert testimony, the Ohio Supreme Court first had ruled “no general acceptance of the expert’s methodology [on BSW] had been established” (State v. Thomas, 1981, p. 521). Nine years later, however, the same court explained that “since 1981, several books and articles have been written on this subject” (State v. Koss, 1990, p. 214). The opinion further explained that “[i]n jurisdictions which have been confronted with this issue, most have allowed expert testimony on the battered woman syndrome (p. 214). The court’s analysis suggested that over time a tipping point had been achieved, at which point the theory, together with its investigative methodology, was no longer characterized as disputed but instead as established science.

State v. Henderson (2011) too acknowledged an emergent scientific consensus about factors that may undermine the reliability of eyewitness identifications. Over the course of a ten-day remand hearing, a Special Master heard testimony from seven experts in the field and reviewed 360 exhibits, including more than 200 scientific studies on human memory and eyewitness identification. The eventual opinion considered particularly important the results of meta-analyses, which looked for statistical trends in all available results for certain types of studies. These meta-analyses, of which there were more than twenty-five, allowed a look at the degree of consensus across studies. The advantage of this kind of study, according to the court, was that “[t]he more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions” (p. 29). Furthermore, in two sections near the end of the opinion, the court described the degree of consensus the Special Master found among
scientists, expert witnesses who testified in person at the hearing, and people beyond the scientific community who were engaged in related law enforcement and reform efforts (pp. 43–44).

3.2 Fidelity to Ideal Models of Scientific or Diagnostic Methodology

The evaluative standard of consensus, however, breaks down under conditions of shared mistake and habitual neglect. As the U.S. Supreme Court eventually noted in Daubert v. Merrell (1992), the “general acceptance” test for scientific knowledge does not independently justify exclusion of opinions and studies that, while not yet widely accepted, still represent valid findings. Sending the case back to a lower court for rehearing, the Court charged judges to evaluate scientific evidence based on specific criteria for scientific validity. For example, the opinion instructed judges to evaluate the question whether a study tested a theory that was in fact falsifiable, as well as whether it reported or otherwise quantified the margin of error. While it does not appear that courts as a whole have excluded or included more expert testimony since that decision (Buchman, 2007), many have hailed the decision as a procedural turning point, one that might embolden judges to be more active and articulate gatekeepers in qualifying and disqualifying testimony by experts (Gatowski et al., 2001).

Melissa Hamilton (2009) showed how external expertise was employed by trial and appellate courts at a time of self-conscious procedural transformation. She surveyed a broad set of appellate opinions in the State of California since the law had been changed to allow experts on domestic abuse to testify in trials, not only, as the original law had allowed, when the abuse victim defended herself against a charge of murder or assault, but also when the abuse victim spoke in court as a witness in a case against her alleged perpetrator of that abuse. Hamilton examined the differences that emerged in the uses of expert testimony in those cases, as well as the criteria applied in evaluating the validity and relevance of that testimony.

The opinions Hamilton reviewed frequently noted calculations of probability that experts reported. These statistical figures represented a tangible measure, an epistemic product that the testimony in given cases yielded. In separate instances, the judges affirmed that a particular claim had been shown by a named expert to have a given percentage of probable truth. These figures were implicitly quantifications of likely error. Whether or not this probability of truth had any relevant relationship to levels of certitude required for different charges (e.g., “beyond a reasonable doubt” or a “preponderance of evidence”) was not possible to discern from the opinions. Still, the regularity with which the opinions alluded to indices of probability suggested that the figures served an epistemic function in representing factual validity.

Nonetheless, when these opinions are read in aggregate, the seeming crispness of the probability calculations was fuzzier than in individual reports. Some testimony focused on the likelihood that battered women recanted earlier accusations they had made. Estimates ranged from “around 50” to 85 percent. In two instances, the very same experts testified to different rates of recantation in different trials. Although Hamilton granted there may have been some operational difference between “refusal to cooperate” and “becoming uncooperative,” she still was troubled by the variation of percentages, as well as the lack of background information retained in the record to help explain the discrepancies (2009, pp. 102–103). Hamilton also found significant discrepancies in the reports on the number of times women typically tried to leave a relationship before successfully doing so. Some opinions reported that number to be
five to seven times, one as three to five times, and another as an average of five times (2009, p. 111).

Particularly striking to Hamilton in her review of these opinions was the lack of attention given to issues of validity and methodology in assessments of this expert testimony. She wrote:

> Many courts report the expert testifying about the prevalence of recantation, denial, and minimization (e.g., commonly, frequently) without providing any research support for their characterizations, even when citing specific statistics (e.g., 71% of battered women recant) . . . As a sociologist, I clamor for more details regarding the source material, such as the date any study was done, the research methodology used, the identity of the primary investigators, or any other information that could reveal bias or overgeneralization. (Hamilton, 2009, p. 110)

From the perspective of an outsider looking in, the appellate opinions seemed unreflective at best and even cavalier in how minimally they summarized and evaluated scientific knowledge about psychological phenomena.

Recently, a district court in Colorado used performance criteria to the evaluate the testimony of a renowned expert on BWS, Dr. Lenore Walker (*State v. Midyette*, 2011). This case differed from the set of opinions Hamilton reviewed since the appellate court itself heard the expert testimony and evaluated its validity. The case also was different in that the expert offered an opinion that the claimant suffered from the syndrome. In other words, the expert presented a particular diagnosis, rather than just a description of a more general phenomenon or scientific theory. In evaluating the validity of that testimony, the court cited a competing expert, Dr. William Hansen, who had been introduced by the prosecution. According to Hansen, a forensic interview and evaluation of the type Dr. Walker had conducted required “more than a client’s self report” (*State v. Midyette*, 2011, p. 8). Citing guidelines described by Hansen, the court noted:

> Evaluators ask attorneys for information, but it is the evaluator’s responsibility to get whatever is missing, particularly prior mental health history. He noted that Dr. Walker did not have Defendant’s therapist’s notes and was not even aware that Defendant had been in counseling. (*State v. Midyette*, 2011, p. 8)

In rejecting the expert’s diagnosis, the court noted the limited observations Walker had made of the claimant, the mixed answers she gave about the method for scoring personality tests, and the extent to which she had allowed the claimant’s lawyer to edit and shape her report.

### 3.3 Figurative Cogency and Political Knowledge

Figurative cogency refers to a form of cultural accretion in which a symbolic construction works in a communicative locale as a vehicle for summing up a perception or judgment. For example, in describing a “geographics of identity,” Susan Stanford Friedman characterized a type of experience in which elements of “cultural hybridity” attain a “material reality[,] political urgency[, and] figurative cogency” (2000). Such an identity-forging construction also describes the process by which external expertise, once admitted to the court room and transmuted into actual and prospective meaning, enters the language of the court and subsequent appellate guidance.
In her analysis of appellate opinions in California on domestic abuse cases, Hamilton (2009) noted the regularity and consistency with which the opinions adopted metaphoric language from the expert testimony, as well as the ease with which metaphoric language came to represent factual reality in descriptions of experience and patterns of behavior. The most common metaphors were accounts of “power and control,” the “cycle of violence,” a “honeymoon period, and “window of opportunity” (p. 112). Often the court summarized how certain actions or patterns of behavior by a man reinforced an expectation for a special “male privilege” and a corresponding female responsibility. For example, one cited expert explained how abusive behaviors served a man’s “need to feel like the ‘king of the castle’” (p. 114). Another testified that the man’s “masculinity is based on the extent of power and control over his female partner, whom he sees as his property” (p. 114). These illustrations of the drive for power and control were often associated with the linked metaphor of a cycle of violence, which characterized the repetitive pattern that conditioned and propelled the parties’ behavior and responses.

Striking about Hamilton’s finding is the degree to which these essentially metaphoric resources stood out in the legal record as higher profile traces of the testimony’s legacy in the law than any assessment of the science or diagnostic accuracy of that testimony. In the set of opinions Hamilton studied, “the court opinions were far more likely to embrace a definition [of BWS] originating in a legal precedent . . . [than by invoking Lenore] Walker or other authority external to the law” (2009, pp. 78–81). In a similar and parallel way, the opinions generally avoided describing the situations in the cases as “psychological conditions” or by using “clinical terminology” (2009, p. 81).

Hamilton (2009) offered two explanations for this preference for testimony elements that either cited precedent or represented figurative cogency. The first was that they provided a mechanism for understanding the possible reasonableness of the beliefs held by and actions taken by the involved parties. She noted that “judicial writings utilize these particular phrases and often expound upon them to create judicial knowledge about the dynamics of abusive relationships and, more particularly, to account for the women’s seemingly vulnerable emotional states and inexplicable behaviors” (p. 117). The metaphoric resources cited from the expert testimony thus serve as a kind of bridge between worlds. It helps judges map, as Friedman (2000) might say, an otherwise unfamiliar and hybrid terrain.

In addition to this function of epistemic mapping, the prominence of these interlinked metaphors also served to represent for the court a context for possible legal or other remedial action. Experts used the term “window of opportunity” to refer to a period of time that recurred within the “cycle of violence,” during which a battered woman could extricate herself from the cycle and from her relationship with the abuser (Hamilton, 2009, p. 117). The significance for the court in this “window” was that, according to the experts’ recounted narratives, the woman’s ability to use that period of time to escape the cycle often depended on encouragement and support of others who could assist the woman in breaking the cycle (pp. 117–118). The metaphor thus served as a framing device to underscore the possible importance of external actions, as a verdict might be, that could hold a perpetrator accountable.

Extensions of expert testimony, particularly in cases concerning BWS, can also substantially transform the character and meaning of underlying law. Robert Mosteller (1996) observed “political influence” in how courts used and built on social framework or “group character” evidence. Of course, in several cases, political bodies explicitly approved statutes in evidence law to guarantee BWS testimony in specific kinds of cases. At the same time, though,
other state courts expanded this right to plaintiffs and witnesses for defenses other than coercion, and in ways quite distinct from the more restrictive rulings courts have made in other legal sub-domains, such as the potentially parallel issue of potentially unreliable eyewitness identifications (1996, pp. 485–491).

The plausibly political influence in how expert testimony has been admitted and used of course may not necessarily be a bad thing. Mosteller (1996) characterized this influence not only as a form of pressure and advocacy by interest groups, but also as a modality in which a “moral component” is “integrated and incorporated into the law” (pp. 465-466, note 15.) Mosteller wrote:

The broad political consensus is both that social reality of the battering relationship is badly imbalanced and that the legal process has not appropriately responded to self-help violence by women. As a result, and despite scientific uncertainty about the existence of a true syndrome, the judgment is that jurors should nevertheless receive such evidence to help redress the imbalance. (1996, pp. 490-1)

The selective use of expert testimony about group character thus appears to institute a substantive and normative change in the processes and standards applied. It represents a change in the scope and force of law, primarily to solve a widely acknowledged social and adjudicatory problem.

4. CONCLUSION

The appellate opinions reviewed here show both openness and caution about the uses of external expertise by courts to frame and construe factual assessments. Concerning the matter of domestic abuse and its possible long-term effects on victims, the opinions readily adopted metaphoric representations of the violent relationships and consistently relied on definitions and explanations of the phenomenon that reinforced through cited precedent to stand as provisional legal categories. In the matter of potentially prejudicial eyewitness testimony, the cases studies showed an opposite tendency: extreme caution, even aversion, to any blanket presumption for expert testimony at trial when such concerns are raised. Instead, in the one specific case reviewed here (State v. Hendersen, 2011), the New Jersey Supreme Court held a specialized hearing that re-evaluated scientific research on the subject and, finding inadequacies in the prevailing legal standard, recommended procedural adjustments in pre-trial hearings and new directives for model jury charges.

The opinions showed significant deference for generalizations and causal theories presented by the subject matter experts. In part, this caution may have been due to the exacting “abuse of discretion” standard used for reversals of trial court decisions on controversial testimony. Still, the opinions also accepted many elements of the testimony at face value. This was particularly true of metaphoric renderings of reality that were consistent with familiar precedent, previous expert testimony, and political consensus about legal problems and possible solutions. While the opinions referred to various standards of scientific reliability, for the most part they did not delve meaningfully into matters of methodology or research design.

Even so, in spite of this tendency to grant scientific expertise a general and autonomous credibility, the opinions also fiercely guarded other knowledge prerogatives for judges and triers of fact. This reluctance to cede adjudicative authority was most striking in State v. Haines (2006) and State v. Midyette (2011). Yet it also animated the strictly procedural
refashioning of the legal standard in State v. Henderson (2011). While that decision left trial courts the discretion in cases where witness reliability was challenged to allow expert testimony at the request of parties, the decision did not suggest case-specific expert testimony as a possible or preferred course of action. When the question was particular, as to whether a given witness was reliable or a particular defendant a recipient of abuse, the courts appeared to tighten the standard of admissibility for expert opinion. Overall, the court was most willing to hear and admit expert testimony on scientific questions if it could extract and retain figuratively cogent traces of the testimony, in the form of precedential legal accretion, while guarding against practices in the testimony that could potentially displace or usurp the voices of actual parties and witnesses of fact.

REFERENCES


