BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT

EVALUATION FOR PERSONAL INJURY CLAIMS

ANDREW W. KANE

JOEL A. DVOSKIN

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BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT

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About Best Practices in Forensic Mental Health Assessment

The recent growth of the fields of forensic psychology and forensic psychiatry has created a need for this book series describing best practices in forensic mental health assessment (FMHA). Currently, forensic evaluations are conducted by mental health professionals for a variety of criminal, civil, and juvenile legal questions. The research foundation supporting these assessments has become broader and deeper in recent decades. Consensus has become clearer on the recognition of essential requirements for ethical and professional conduct. In the larger context of the current emphasis on "empirically supported" assessment and intervention in psychiatry and psychology, the specialization of FMHA has advanced sufficiently to justify a series devoted to best practices. Although this series focuses mainly on evaluations conducted by psychologists and psychiatrists, the fundamentals and principles offered also apply to evaluations conducted by clinical social workers, psychiatric nurses, and other mental health professionals.

This series describes "best practice" as empirically supported (when the relevant research is available), legally relevant, and consistent with applicable ethical and professional standards. Authors of the books in this series identify the approaches that seem best, while incorporating what is practical and acknowledging that best practice represents a goal to which the forensic clinician should aspire, rather than a standard that can always be met. The American Academy of Forensic Psychology assisted the editors in enlisting the consultation of board-certified forensic psychologists specialized in each topic area. Board-certified forensic psychiatrists were also consultants on many of the volumes. Their comments on the manuscripts helped to ensure that the methods described in these volumes represent a generally accepted view of best practice.

The series' authors were selected for their specific expertise in a particular area. At the broadest level, however, certain general principles apply to all types of forensic evaluations. Rather than repeat those fundamental principles in every volume, the series offers them in the first volume, *Foundations of Forensic Mental Health Assessment*. Reading the first book, followed by a specific topical book, will provide the reader both the general principles that the specific topic shares with all forensic evaluations and those that are particular to the specific assessment question.

The specific topics of the 19 books were selected by the series editors as the most important and oft-considered areas of forensic assessment conducted by mental health professionals and behavioral scientists. Each of the 19 topical books is organized according to a common template. The authors address the applicable legal context, forensic mental health concepts, and empirical foundations and limits in the "Foundation" part of the book. They then describe

preparation for the evaluation, data collection, data interpretation, and report writing and testimony in the "Application" part of the book. This creates a fairly uniform approach to considering these areas across different topics. All authors in this series have attempted to be as concise as possible in addressing best practice in their area. In addition, topical volumes feature elements to make them user friendly in actual practice. These elements include boxes that highlight especially important information, relevant case law, best-practice guidelines, and cautions against common pitfalls. A glossary of key terms is also provided in each volume.

We hope the series will be useful for different groups of individuals. Practicing forensic clinicians will find succinct, current information relevant to their practice. Those who are in training to specialize in forensic mental health assessment (whether in formal training or in the process of respecialization) should find helpful the combination of broadly applicable considerations presented in the first volume together with the more specific aspects of other volumes in the series. Those who teach and supervise trainees can offer these volumes as a guide for practices to which the trainee can aspire. Researchers and scholars interested in FMHA best practice may find researchable ideas, particularly on topics that have received insufficient research attention to date. Judges and attorneys with questions about FMHA best practice will find these books relevant and concise. Clinical and forensic administrators who run agencies, court clinics, and hospitals in which litigants are assessed may also use some of the books in this series to establish expectancies for evaluations performed by professionals in their agencies.

We also anticipate that the 19 specific books in this series will serve as reference works that help courts and attorneys evaluate the quality of forensic mental health professionals' evaluations. A word of caution is in order, however. These volumes focus on best practice, not what is minimally acceptable legally or ethically. Courts involved in malpractice litigation, or ethics committees or licensure boards considering complaints, should not expect that materials describing best practice easily or necessarily translate into the minimally acceptable professional conduct that is typically at issue in such proceedings.

Kane and Dvoskin offer a concise description of a range of issues relevant to the forensic evaluation of personal injury claims. They cover the foundational tort law under which such evaluations are conducted, the particular duties of the forensic evaluator, and the supporting scientific evidence. They also provide step-by-step guidance, from the first contact with the attorney to the completion of all evaluative tasks (including possible expert testimony), in the assessment of personal injury claims. The broadly-applicable forensic assessment components and the elements specific to personal injury are blended in a clear, masterful fashion.

Kirk Heilbrun
Alan M. Goldstein
Thomas Grisso

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The Legal Context

1

Introduction

As is the case with all of the volumes in this series, this book seeks to serve as a bridge between the vastly different worlds of psychology and psychiatry, and the law, and specifically to guide those boundary spanners—forensic mental health experts—who regularly set foot in both worlds at once. In this case, we turn to the civil law, which establishes a set of rights and duties that govern the daily business of life, and the manner in which citizens interact with one another.

Unlike criminal law, which focuses on the behavior of the perpetrator, and in which crimes typically result in the loss of freedom and are determined by a prohibited act, in civil law the consequences of a breach of duty are far more likely to be determined by the harm suffered by the victim. When these losses are concrete, for example the destruction of a vehicle, there may be no need for psychological expertise in deciding what is required to make the victim whole. However, this is not the case when the harms suffered are psychological in nature.

Generally, the consequences of civil wrongs, called *torts*, are simply designed to make the victim whole, or to restore the person to his or her condition prior to the commission of the tort. Thus, when the harms claimed are psychological, that is, when the victim experiences emotional harm, cognitive impairment, or a loss of behavioral control, the courts turn to mental health professionals to advise them about the degree to which the plaintiff has been harmed, and what can be done to restore functioning and to compensate the victim for his or her suffering, especially when the impairment or disability is permanent.

This first chapter explains the fundamental components of tort law, including the definition of duty, an explanation of various theories of causation, how harms are identified and compensated as damages, as well as the basic elements of civil process that forensic experts will need to know from the first phone call they receive regarding a case. We conclude with a discussion of the nature and admissibility of psychological expert testimony, and the duties owed to the court by the testifying expert to the court.

Chapter 2 addresses the basic duties of a forensic mental health expert witness, and how to approach cases in general, including the duty to be objective and the common sources of error and bias that threaten accuracy and objectivity. Chapter 3 discusses the nature of psychological evidence, and the difficulty in coming to sound conclusions when psychological harms are largely based on the plaintiff's subjective experience of distress. Special emphasis is placed on the evidentiary foundation of inferential opinions, and especially on the process of evaluation and psychological testing, as well as the thorny issue of malingering. Chapter 4 addresses a variety of professional and ethical rules for forensic mental health experts, and explains the process by which cases are conducted, offering step-by-step guidance, from the first phone call from an attorney until the case has been decided. Chapter 5 explains in detail the various ways of collecting reliable and valid data, including psychological interviews, sources of collateral information, and especially the strengths and weaknesses of various psychological instruments commonly used to assess psychological harms. The data having been gathered, Chapter 6 discusses the interpretation of various sources of data toward conclusions about the legal questions that will be posed, especially the determination of diagnosis, describing impairment, and deciding the degree to which it has caused disability in the plaintiff. Finally, Chapter 7 provides a useful process and structure for writing reports and preparing testimony.

We now turn toward description of the process of civil law, and define the terms and concepts that will be used throughout this volume.

Tort Law

Personal injury is an area of *tort* law, involving a "private or civil wrong, or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages" (Black's Law Dictionary, 5th ed., 1979, p. 1335). A tort requires that the defendant owed a duty to the plaintiff, that the duty was breached, that the plaintiff was injured as a result of the breach, and that the plaintiff's injury was proximately caused by the defendant. The defendant's breach may have involved *negligence*, *malpractice*, deliberate indifference, or another legal theory. The purpose of tort law is to distribute costs of harmful events based on social policies. "The commonly understood goal of tort compensation is to restore the injured to their pre-accident condition, to make them whole" (Shuman, 1994). Tort law attempts to deter unreasonable or negligent conduct and to compensate individuals who are injured with money for treatment or other means of achieving compensation (Shuman & Daley, 1996).

Definition of a duty usually rests on the *standard of care*. In a negligence case, the usual standard is the "reasonable person test"—that is, would a reasonable person have done what the defendant did? In a malpractice case, the standard of care is typically defined as whether the professional (e.g., physician, psychologist) acted as would a reasonable professional of the same type under the same or a similar set of circumstances (Greenberg, Shuman, Feldman, Middleton & Ewing, 2007; Young and Kane, 2007).

When a plaintiff has been physically harmed, courts have traditionally had no difficulty allowing claims to be made. When the harm was solely psychological or emotional, however, until fairly recently it was difficult to get courts to accept these cases. The concern was "that claims for psychological harm are easy to feign, difficult to verify, potentially limitless in frequency and amount, or somehow less deserving" than claims involving physical injuries (Shuman & Hardy, 2007, p. 529; see also Chamallas & Kerber, 1990). Currently, all jurisdictions permit recovery of damages for

emotional or mental injuries that are proximately associated with physical injuries (Shuman, 2005).

Accordingly, for many years, cases alleging psychological or emotional damages were generally allowed to proceed only if there was a physical impact (under the "*impact rule*," e.g., the plaintiff was hit by someone or something). This gradually gave way in the first part of the 20th century to a "*zone of danger*" test in which the plaintiff was alleged to have been placed in danger or fear of physical injury by virtue of the defendant's behavior. This was expanded to include a "*bystander rule*" under which an individual who wasn't in physical danger but who witnessed (and suffered significant psychological or emotional trauma from) a negligent action could sue for damages (Campbell & Montigny, 2004; Gabbay & Alonso, 2004; Shuman, 2005). Shuman and Hardy (2007) cite the 1968 California Supreme Court case of *Dillon v. Legg,* in which a mother witnessed a negligent injury to her child, as the landmark case in this area. After this case, courts increasingly focused on proximate cause as the basis on which psychological or emotional damage cases may be brought (Shuman). Even so, courts still tend to question the validity of claims for psychological and emotional harm far more than those for physical harm (Chamallas & Kerber, 1990; Shuman & Hardy). Courts may, however, welcome expert psychological and psychiatric testimony that helps the judge and jury understand mental disorders and psychological stress (Shuman).

CASE LAW

Dillon v. Legg (1968)

The Supreme Court of California ruled that in determining whether the defendant owes a duty of care to the plaintiff, the court should consider the following: 1) the proximity of the plaintiff to the accident, 2) whether the plaintiff directly witnessed the accident, and 3) whether the plaintiff was closely related to the victim.

Established the tort of negligent infliction of emotional distress

It was not until 1993, in *Harris v. Forklift Systems, Inc.,* the Supreme Court indicated that evidence of psychological or emotional harm to an individual could be a substantial factor in determining whether an employer is responsible for sexual harassment. This was the first case in which the Supreme Court ruled that a psychological or emotional injury, in the

absence of a physical injury, could be presented in the liability phase of a trial to demonstrate that a tort had occurred (Call, 2003).

CASE LAW

Harris v. Forklift Systems, Inc. (1993)

The first case in which the U.S. Supreme Court ruled that a psychological injury, in the absence of a physical injury, could be presented as evidence in a civil suit.

Causality and Proximate Cause

Causality or *causation* involves the establishment of some direct link or relationship between an event and a subsequent consequence of that event. However, it does not necessarily indicate that it is the sole, primary or predominant cause; it may simply be a contributing factor. In contrast, *proximate cause* involves "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred" (Black's Law Dictionary, 5th ed., 1979, p. 1103). Proximate cause, therefore, is the event or behavior *but for* which the result would not have occurred. In most cases, proximate cause is implied if it was reasonably foreseeable that a first action or event would lead to the actual outcome, although one event or action could proximately cause a harm that was unforeseeable. Causation is also supported if the first action or event is a substantial factor leading to the actual outcome (Melton, Petrila, Poythress, & Slobogin, 2007).

Ackerman and Kane (1998) indicate that the cause need not be unique or exclusive for liability to be associated with it. For example, the event or behavior that was proximately causal may have either directly caused an injury or may have simply made an existing problem worse. However, "[t]he law of torts indicates that the tortfeasor is liable whether the stressor caused the injury or aggravated a preexisting condition" (p. 578).

Damages

The legal definition of "damages" refers to the compensation received by the plaintiff. Koocher (1998, p. 510) defines damages

as "[m]oney received through judicial order by a plaintiff sustaining harm, impairment, or loss to his or her person or property as the result of the accidental, intentional, or negligent act of another." Damages may include compensation for "past and future loss of earning capacity, past and future medical and other care costs, as well as past and future pain and suffering" (Douglas, Huss, Murdoch, Washington, & Koch. et al., 1999). *Punitive damages* may be assessed to punish the defendant if the defendant's conduct was "outrageous or recklessly indifferent to the interests of the claimant" (Melton et al., 2007, p. 410).

"Traumatic" vs. "Tortious"

Throughout this book, we will use the terms "traumatic" or "allegedly traumatic" to refer to the events that are alleged to have been the cause of the psychological harm. Some authors would prefer the term "tortious," but we believe the variations on "traumatic" to be better in this context. Generally, the definition of "traumatic" typically refers to any event that places serious stress, shock, or injury to the body; similarly, emotional trauma includes an event that creates substantial emotional distress, psychological pain, or (especially in children) disruption to psychological development. Thus, for our purposes, any event that is deemed to be the cause of psychological harm is presumptively traumatic.

General vs. Specific Causation

Courts usually distinguish between *general* and *specific causation* in cases involving medical or psychological issues. The former refers to the question of whether a substance, material or event can cause a physical disorder (e.g., cancer.) The latter refers to whether the alleged causal agent produced a specific disorder in a specific person. According to Faigman and Monahan (2005), the parallel in psychology would be in terms of "social authority, social facts, and social frameworks" (p. 648). The first is analogous to a legal precedent, but in the form of prior research. Examples would include psychological research that bears on major social questions

presented to the courts—for example, abortion, segregation, or whether juveniles should be subject to the death penalty, all issues on which the United States Supreme Court has ruled, in part based on the social authority of the research. The second, social facts, would be in the form of specific facts relevant to a case (e.g., the results of a survey commissioned for that case). One area in which this has been relevant is in determining whether the average person would find that a specific work, taken as a whole, appeals to prurient interests in obscenity cases. Forensic mental health experts also address issues of mental illness, competencies, risk of violence, and so forth. The last, social frameworks, would be a combination of the two—that is, social facts that are alleged to be specific examples of social authorities. Examples include a "battered woman syndrome" or "rape trauma syndrome," each of which entails both a general component (social authority) and a specific component (whether the alleged syndrome category applies to a specific individual in the instant case).

Summary Judgment

Federal Rule of Civil Procedure 56 and state equivalents address "summary judgment." A motion for summary judgment requests that the court consider the evidence admitted up to the point at which the motion for summary judgment is made (e.g., affidavits, statements under oath during depositions, responses to interrogatories). Under Federal Rule of Civil Procedure 56(C), the party moving for summary judgment must allege "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In other words, even if all of the factual allegations of the opposing party were true, the moving party would still prevail. Potential bases for a summary judgment include proof that the plaintiff signed a legally binding document preventing the plaintiff from suing the defendant; that a given defendant was not involved in the accident that caused the plaintiff's injury; or that the expert evidence offered by the plaintiff so seriously violated the *Daubert* (1993) requirements that the expert would not be permitted to testify in the trial, leaving the

plaintiff without an expert. *Daubert* itself was initially decided by the trial court on the last basis, that is, that the evidence offered by eight well-credentialed experts for the plaintiff "did not meet the applicable [*Frye v. United States,* 1923] 'general acceptance' standard for the admission of expert testimony" (*Daubert*, p. 509).

Standards for Testimony: *Daubert, Frye,* and *Mohan*

For many years, the dominant standard for admitting expert testimony in American courts was *Frye v. United States* (1923). *Frye* required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (p. 1014).

CASE LAW

Frye v. United States (1923)
The Court held that expert opinion based on a scientific technique is admissible only where the technique is generally accepted in the relevant scientific community.

Daubert v. Merrell Dow Pharmaceuticals (1993)
The Court ruled that judges be given the role of "gatekeeper," using a number of criteria (e.g., testing, peer review, error rate, and underlying science) to determine admissibility of expert testimony.

As indicated in the first book in this series (Heilbrun, Grisso & Goldstein, 2009), the U.S. Supreme Court indicated that the Federal Rules of Evidence (most-recent version, December 1, 2009) had superseded *Frye* in its ruling in *Daubert v. Merrell Dow Pharmaceuticals* (1993). The Supreme Court also specified a number of criteria that might be used by trial courts to assess the reliability (i.e., "trustworthiness," *Daubert*, 1993, footnote 9) of expert testimony. The Court emphasized that "[a]ll relevant evidence is admissible" (p. 587), specifically required that an "expert's testimony pertain to 'scientific knowledge'" (p. 590), and that expert testimony must "assist the trier of fact to understand or determine a fact in issue" (p. 592), among other possible requirements. In *Kumho Tire Co. v. Carmichael* (1999, p. 137), the Supreme Court "noted that *Daubert* discussed four factors — testing, peer review, error rates, and "acceptability" in the relevant scientific community — which

might prove helpful in determining the reliability of a particular scientific theory or technique." Specifically:

(1) "whether it can be and has been tested… [and] can be falsified;"

(2) whether the "theory or technique has been subjected to peer review and publication;"

(3) that consideration be given to the "known or potential rate of error;" and

(4) that there is "general acceptance of the particular technique within the scientific community." [*Daubert,* 1993, pp. 593–594]

Many states have adopted the criteria from *Daubert* and its progeny by statute or case law, some have adopted portions of it, some continue to adhere primarily to *Frye*, and some have their own distinct criteria for expert testimony. The expert is obligated to know what the criteria are in any jurisdiction in which he or she testifies.

The Supreme Court remanded *Daubert* to the Ninth Circuit Court of Appeals, which indicated, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1995), a number of additional criteria that might be applied to expert testimony.

Frye was often criticized as being too conservative and too arbitrary, leading to novel evidence being excluded while permitting unreliable evidence to be admitted simply because it was generally accepted (Melton et al., 2007). The Supreme Court indicated that the Federal Rules of Evidence "displaced" Frye, replacing it with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony [*Daubert,*

INFO

The Daubert standard replaced the Frye standard at the federal level, but states are free to choose either, or a combination of both, or another method, to determine the standard for admissibility of testimony. It is your responsibility to know what criteria are used in the jurisdiction in which you are testifying.

1993, p.588]. Indeed, the Supreme Court's ruling in *General Electric Co. v. Joiner* (1997) ensured that trial judges would have wide discretion in the application of the *Daubert* standard (Dvoskin & Guy, 2008).

As a result of the combined influence of *Daubert, Joiner* and *Kumho*, Rule 702 of the Federal Rules of Evidence was amended in 2000 to read:

> Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Underlined portion was added to the old Rule 702.]

To the factors specified by the Supreme Court in *Daubert*, the Advisory Committee on the Federal Rules of Evidence (2000) added five additional suggested areas of consideration based on court rulings after *Daubert*:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (9th Cir., 1995, p. 1317).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

(3) Whether the expert has adequately accounted for obvious alternative explanations.

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, (7th Cir., 1997, p. 942).

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

It should be noted that the Supreme Court, in *Barefoot v. Estelle* (1983), ruled that the testimony of a psychiatrist on the basis of clinical experience was admissible, because "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party" (p. 898). Sales and Shuman (2005) suggested that a Texas federal court decision provides criteria that could be used in a *Daubert* analysis of clinical testimony [*Antoine-Tubbs v. Local 513 Air Transp. Div.* (N.D. Texas, 1998]:

(1) personal examination of the plaintiff by the doctor;

(2) personally taking a detailed medical history from the plaintiff;

(3) using differential diagnosis and etiology;

(4) reviewing tests, reports and opinions of other doctors;

(5) reviewing other facts or data reasonably relied on by medical experts in forming opinions or inferences as to medical causation;

(6) reference to medical literature; and

(7) utilizing the doctor's training and experience.

Similarly, a forensic mental health expert would be expected to do a personal examination, take a detailed history, construct a differential diagnosis, review tests, reports and opinions of relevant clinicians, review information reasonably relied upon by psychological experts in assessing causation, referring to the psychological and medical literature, and utilizing the expert's training and experience.

The Supreme Court made it clear in *Daubert* and its two progeny [*General Electric Company v. Joiner* (1997) and *Kumho Tire Co. v. Carmichael* (1999)] that trial court judges are to exercise

their gatekeeping functions. It should be noted, though, that trial judges are not required to question expert testimony. It is up to attorneys to bring *motions in limine* [i.e., a motion to exclude "matters which are irrelevant, inadmissible and prejudicial" (*Black's Law Dictionary*, 1979, p. 914)] if they wish to have proposed testimony excluded, or to address the proposed testimony during trial testimony. Finally, it should be noted that the Supreme Court of Canada, in *R. v. Mohan* (1994), indicated that trial judges are to act as gatekeepers for expert evidence, that evidence be relevant, that experts are to assist the trier of fact in understanding the issues and evidence, and that experts must have specialized knowledge.

Put simply, courts applying *Daubert* are encouraged to ask two questions of experts: "Why should we believe you?" and "Why should we care?" The first speaks to the credibility, reliability, and validity of experts' opinions and the facts and logic upon which they are based. The second addresses the need for the expert to identify the relevance of the opinions to be offered to the specific questions at bar. Consistent with long traditions of Anglo-American law, this probative value must then be weighed against any prejudicial effects of the opinions to be offered (Dvoskin & Guy, 2008).

We would advise forensic experts to base their testimony on both the prevailing standards of their jurisdictions and on broader bases such as research published in peer-reviewed journals. Experts should note, however, that the Supreme Court commented in *Kumho* on the potential for some of the best research to be found in non-peer-reviewed journals, so such journals should not be excluded from the expert's search of the professional literature. The same is true of books, monographs, government reports, and so forth. Experts should also be aware of evidence that peer review is a flawed assumption of trustworthiness, despite its prominent place in the Supreme Court decisions (Kane, 2007c). *Peer review* should not be taken as incontrovertible evidence of validity or reliability. Peer review probably improves the accuracy of most published articles, but peer review offers no guarantee of trustworthiness. Peer review is also better than no peer review — though even "non-peer reviewed" articles are very often informally peer reviewed by one's colleagues, and many non-peer reviewed articles

BEST PRACTICE

Do not automatically exclude non-peer reviewed journals or books from your search of the professional literature. Often, articles in these journals contain valid, reliable, and useful information.

contain valid, reliable, and useful information. The "best practice" is to critically evaluate every source, not to uncritically assume that any source is trustworthy, even if formally peer reviewed, and regardless of how prestigious the journal. Experts should also be familiar with the Federal Rules of Evidence, even if they do not testify in federal courts and if the states in which they testify do not follow the Federal Rules. An expert whose work and testimony meets the standards of the Federal Rules is likely to do well in meeting the standards of his or her own jurisdiction(s).

Workers' Compensation versus Tort Litigation

Torts involve allegations of civil wrongs that are presented to juries (in most cases) for a determination as to whether there was a duty, the duty was breached, the breach was the proximate cause of an injury, and the plaintiff should receive damages for his or her suffering. Such litigation is guided by the Federal Rules of Evidence or their state equivalents.

However, in many states, if the allegation of injury involves a work-related incident or accident, the adjudication may take place in an administrative setting (e.g., workers' compensation cases) rather than a civil court (Shuman, 2005). In such cases, the trier of fact is generally an administrative law judge, and many of the rules of evidence are suspended to facilitate the efficiency of the process. Juries are rarely involved. Because the decision-maker is likely to be familiar with the types of compensable injuries, expert testimony may be more limited than in civil court litigation, and it may be presented in written form rather than through testimony. Expert testimony substantiating a claim is generally required, however. Several issues are the same as in a tort case, including whether there is a psychological injury and, if so, whether it can be attributed to the incident in the workplace (Walfish, 2006).