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## **Who Is and Who Is Not an Expert Witness?**

By Marilyn Raia

It is not unusual for each side in a maritime case to offer testimony at trial from an expert witness. An expert witness is a disinterested and unbiased person who, based on education and experience, has knowledge of a subject that is beyond the everyday knowledge of a judge or juror. An expert's testimony is offered to help the judge or jury understand one or more aspects of a case.

Before a person is allowed to give expert testimony, the judge must first determine whether the proffered expert has sufficient education and experience to qualify as an expert on the subject of the expected testimony. When making that finding, the judge is called "the gatekeeper". As the gatekeeper, the judge has broad discretion to determine if the expert testimony is sufficiently reliable to even be considered at trial, not whether it will be persuasive. The judge's decision on the admissibility of expert witness testimony will not be overturned on appeal unless it was "manifestly erroneous."

### **The Standards for Expert Testimony**

The party offering expert testimony has the burden of establishing the expert's expertise. Whether expert testimony is admissible in a federal case is governed by the Federal Rules of Evidence as interpreted by the United States Supreme Court in *Daubert v. Merrell Dow Pharm. Inc.* 509 U.S. 579 (1993). To determine whether the offered expert testimony meets the standards of admissibility, the judge looks at three factors. First, the judge considers whether the expert is qualified to testify competently, meaning whether the expert has satisfactory qualifications. Second, the judge considers whether the method used by the expert to reach his or her opinion was sufficiently reliable. Finally, the judge must determine whether the expert's testimony will assist the trier of fact in understanding the evidence and making a decision. An expert may not give legal opinions or testify about how an issue should be decided. Sometimes an expert is allowed to testify on certain topics but not on others. The purported expert's self-characterization as such is irrelevant.

If a party believes another party's designated expert does not meet the standards for giving expert testimony, such party can move before trial to exclude or limit the purported expert's testimony. Such party may also move to exclude or limit the purported expert's testimony after the expert has testified about his or her qualifications, or move to strike the expert's testimony after the expert has testified. Two recent cases involving incidents on cruise ships illustrate a judge's reasoning when considering whether to exclude, strike, or limit an expert's testimony.

### **Expert Opinion about Bath Mat Totally Excluded**

*Jordan v. Celebrity Cruises, Inc.* 2018 WL 3584702 (S.D. FL 2018) involved a lawsuit by passenger Jordan who was seriously injured on a cruise ship as a result of slipping and falling in the bathroom of her cabin. Among other things, Jordan alleged the vessel owner was negligent in failing to provide a non-slip bath mat directly inside the step-over doorway leading to the bathroom.

Jordan intended to offer the testimony of Randall Jacques, an alleged expert on cruise ship safety, on three topics: 1) the cause of her fall, i.e. the vessel owner's negligence; 2) whether the bath mat was folded in compliance with vessel policy; and 3) whether the towel used as the bath mat was a hazard for passengers. The vessel owner moved to exclude the testimony of the expert on three grounds: 1) his opinions would not assist the trier of fact; 2) his opinions



would be unsupported by any recognized methodology and unreliable; and 3) he was not qualified to give the opinions he was expected to give. The court granted the vessel owner's motion to exclude the expert's testimony under the Daubert standards.

The judge began his analysis by noting the determination of an expert witness's competence to give an expert opinion is not a strict inquiry. Instead, the judge determines if the expert is "minimally qualified" to give an expert opinion. Thereafter, the trier of fact decides what credibility and weight to give to the opinion.

The judge found Jacques was not qualified to give an opinion on the cause of Jordan's fall because nowhere in his expert report did Jacques explain how his background and experience applied to the facts of the case or to his opinions. For example, Jacques purported to be a marine safety expert on cruise line conduct. However, his report did not reveal any experience while employed by a cruise line investigating a shipboard accident involving a passenger fall on a bath mat. His experience was in vessel security. Further, his opinion that the vessel owner's negligence with respect to the bath mat was the cause of the fall constituted an impermissible legal conclusion.

The judge excluded Jacques' second opinion about the improper folding of the bath mat because Jacques had no stated work experience in training or supervising housekeeping staff on the alleged proper way to fold a bath mat. Jacques also intended to opine that the bath mat should have been folded in thirds rather than halves to avoid the passenger from stepping on it and having it slip. However, the judge noted Jacques did not support that opinion with any facts or work experience. The judge also noted that while Jacques had been a passenger on a cruise ship twenty times, his observations of the practices on other cruise ships did not establish an industry standard.

The judge determined Jacques was unqualified to give an opinion on whether the bath mat was a slipping hazard for passengers because he lacked the requisite experience. The judge found Jacques' experience as a security officer had not involved conducting a study of the co-efficient of friction to determine if a floor is unreasonably slippery.

In addition to a lack of qualifications, the judge found a lack of an appropriate methodology as the basis for his opinion. The judge noted Jacques merely put his hand on a bath mat and pushed it around on a floor. Jacques did not cite any authorities establishing such action was sufficient to determine the slipperiness of the floor and bath mat or whether the floor met the applicable standards.

### **Marine Transportation Professor's Expert Opinion Limited**

Incardone v. Royal Caribbean Cruises Ltd. 2018 WL 6520934 (S.D. Fl. 2018) involved a group of autistic children and their families who were passengers on a cruise ship, *Anthem of the Seas*. They sought compensation for psychological injuries allegedly suffered when the *Anthem* encountered a winter storm and hurricane force winds during the cruise. The plaintiffs argued the *Anthem* was negligently and recklessly directed into the path of the storm even though storm warnings had been received before sailing and the vessel owner knew the propulsion system might experience problems in severe weather. Among other things, the vessel owner argued the storm was an Act of God for which no liability could be imposed.

Plaintiffs offered the expert testimony of Capt. Joseph Ahlstrom, a maritime transportation professor, on the subject of shipboard safety management, shipboard security, and shipboard



operations. He testified the owner and/or crew intentionally and/or negligently sailed into hurricane force winds contrary to various maritime safety procedures.

The vessel owner moved to strike Ahlstrom's testimony relying on the Daubert standards. It argued Ahlstrom was not qualified by his experience to testify about the vessel's propulsion system and weather forecasting. It argued Ahlstrom's methodology was not reliable because he became involved in the case with pre-conceived ideas and merely "second-guessed" the master's actions. It also argued Ahlstrom's testimony was not helpful because it contained legal conclusions. Finally, it argued Ahlstrom's opinions about the Anthem sinking and the number of lifeboats, and his references to well-known vessels involved in maritime tragedies such as the *Titanic*, *El Faro* and *Costa Concordia* were unfairly prejudicial.

The judge found much of Ahlstrom's testimony constituted impermissible legal conclusions. For example, Ahlstrom testified that the ship's master demonstrated "a course of conduct and such an entire want of care as to raise a presumption of a conscious indifference to consequences and which shows wantonness and recklessness and a gross disregard for the safety and welfare of the passengers and crew." The judge held that testimony was not helpful to the trier of fact because it was nothing more than what the lawyers would argue in closing argument.

The judge found some of Ahlstrom's opinions relating to safety management to meet the Daubert standards. He was qualified to give those opinions based on his experience as a professor and vessel captain, and had used appropriate methodology and resources to formulate them. His testimony was permitted on shipboard safety management procedures applicable to the ship and whether they were followed on the subject voyage.

The judge found Ahlstrom not qualified to opine on weather forecasting because he had no advanced training on that subject. However, he was allowed to testify generally about what weather forecasts are available to a vessel and how they should be used. The judge also found Ahlstrom not qualified to testify about the specifics of the *Anthem's* propulsion system and noted Ahlstrom admitted he had no expertise with the propulsion system. However, he was permitted to testify that if a problem with the propulsion system occurs, the master should undertake certain actions.

Finally, the judge ruled the probative value of Ahlstrom's comparison of the experience on the Anthem to the sinking of the *Titanic*, *El Faro* and *Costa Concordia* was likely "substantially outweighed" by its prejudicial effect and excluded it.

Expert witness testimony is frequently offered at trial. The trial judge decides who is, and who is not, an expert on a subject based on standards articulated by the United States Supreme Court. Whether the purported expert witness characterizes himself or herself as an expert is of no consequence.