Witness Fitness

In the classic 1992 cinematic discourse on advanced jurisprudence, *My Cousin Vinny*, the abrasive, yet knowledgeable, Mona Lisa Vito (Marisa Tomei) turned the trial around with her compelling tire track testimony.

Before she was allowed to proceed, however, the prosecutor sought to veto Vito from rolling out her opinions. But Vito's airtight responses to the prosecutor's inquiries as to her qualifications and expertise left the questioner helplessly spinning his wheels.

Experts have been around for a long time. In the *Aeneid*, the Roman poet Virgil stated "experto credite" – "believe an expert." Lawyers frequently follow that advice – or at least encourage juries to. They call upon the services of expert witnesses, persons who from education and/or experience possess special knowledge about a particular subject not possessed by the average person.

Because of their perceived status and the fact that they are allowed, unlike most other witnesses, to offer opinions, experts carry great weight in court. There is thus often heated debate over whether a particular individual is qualified to be an expert on one or more issues presented in a case.

This long road takes us from *Virgil to Vigil v. Michelin North America, Inc.*, decided on August 23, 2007 by the United States District Court for the Western District of Texas, El Paso Division.

According to the Court, Miguel Zubia owned a 1956 Chevy sedan. On May 6, 2004, while traveling in the Chevy with Vincente Vigil and Modesto Jimenez, the automobile experienced an unexpected tire failure, which led to a single-vehicle rollover accident.

The three and others brought a lawsuit against Michelin and others alleging negligent and defective tire design, manufacture, and marketing. The defendants denied the allegations.

Each side assembled its own contingent of tire, accident reconstruction/scene investigation, and "human factors"/warnings experts. Correspondingly, each side also filed a litany of motions to exclude the opposing party's expert testimony.

The Court began its analysis by noting that Federal Rule of Evidence 702 governs the admissibility of expert testimony in the federal court system. That rule states:

"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."

The Court noted that in the landmark 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court charged trial courts with the responsibility of acting as gatekeepers to exclude unreliable expert testimony under Rule 702. "[T]o aid the trial courts in determining the reliability of expert testimony, the *Daubert* Court announced a non-exhaustive list of factors for trial courts to consider: (1) 'whether [the theory or technique] can be (and has been) tested;' (2) 'whether the theory or technique has been subjected to peer review and publication;' (3) 'the known or potential rate of error;' (4) 'the existence and maintenance of standards controlling the [theory or] technique's operation;' and (5) whether the theory or technique has 'general acceptance' within the scientific community." Basically, "the Daubert factors act to ensure that an expert's opinion is grounded in more than 'unsupported speculation or subjective belief.'"

In the *Vigil* case, the Court assessed 11 proposed experts using that criteria. It ended up qualifying some (and thus denying the other side's motion to exclude them) and not qualifying others (thus granting the motion to exclude).

For example, the Court refused to allow a proposed expert to testify on tire issues. "Although Rule 702 is generally permissive with respect to the admission of expert witnesses and expert testimony, 'this is not to say that any self-described "expert" will automatically be allowed to testify. The requirements of Rule 702, though minimal, have occasionally been breached, and Courts are not hesitant to exclude the "expert" who is utterly lacking in qualifications.'" The witness apparently made the Court's decision easy, admitting that "there were some very technical documents that I read that I basically didn't understand, because I didn't have the technical background."

On the other hand, the Court found an accident reconstructionist "qualifie[d] as an expert witness based on his extensive experience and training" – even though as the opponents noted, he "is not a professional engineer and has only one semester of education beyond high school . . . ." This was because the requisite knowledge may be obtained through either education or training. The witness had 14 years of experience with the El Paso Police Department, four of which were spent focusing on investigating major traffic accidents, had studied and instructed on various investigative methods, and had 18 years of private traffic accident reconstruction and commercial investigation work.

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This case illustrates that, contrary to the popular saying, not everyone's an expert. And, sometimes, someone you might not think was, is. Ask my cousin Vinny.