

Daubert for "Soft" Sciences?
Yes, but focus on Kumho Tire.

Michael Brennan

Brian Cahill

Gass Weber Mullins

Daubert and Soft Science

Ladner v. Higgins, Inc.,

71 So. 2d 242, 244 (La. Ct. App. 1954)



Ladner v. Higgins, Inc., La. Ct. App. 1954

- Suit for Workmen's Compensation: \$30 per week/400 weeks
- Plaintiff on scaffold surrounding a ship about to be launched; fell 8 feet to ground.
- Scaffold fell on his right shoulder – per the plaintiff's doctor afflicted with “post-traumatic neurosis.”
- Trial court: **For the plaintiff.**

Ladner v. Higgins, Inc., La. Ct. App. 1954

Expert testimony:

π = “suffering from traumatic
neurosis”

Δ = “will get better when lawsuit
ends”

2nd Δ = “malingerer”

Ladner v. Higgins, Inc., La. Ct. App. 1954

2nd Δ expert:

Q: “Is that your conclusion, that this man is a malingerer?”

A: “I wouldn’t be testifying if I didn’t think so, unless I was on the other side, then it would be a post-traumatic condition.”

AFFIRMED

Daubert and Soft Science

- Who wrote the book on scientific evidence?
- Edward Imwinkelreid – his book cited in Daubert case.
- E.I.: “5 typical Daubert factors ill-suited for social science.”



Daubert [Δο-βεαρ] n. proper name, synonymous with the act of rooting out junk science.
v. to prevent an expert witness from giving testimony due to a lack of reliability; e.g. "I am going to Daubert Dr. Smith."

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993).

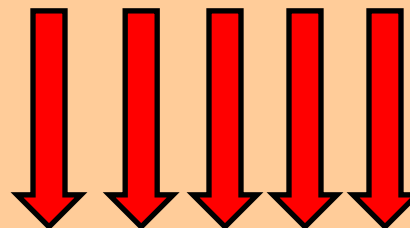
Epidemiology



GE Industrial Systems

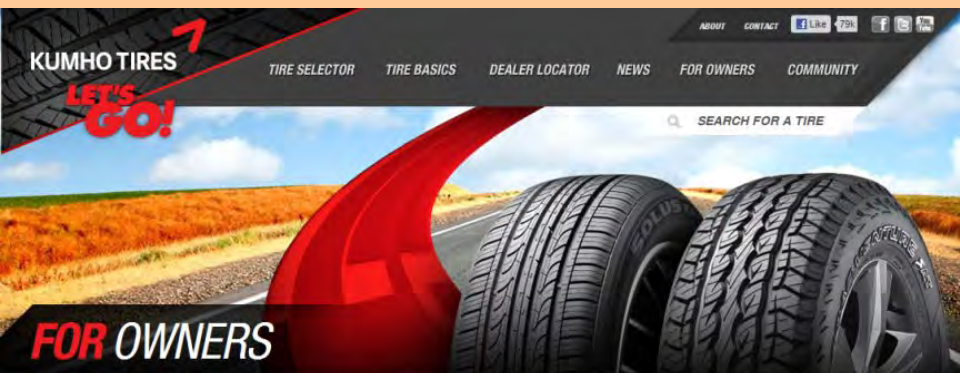
General Electric Co. v. Joiner,
522 U.S. 136 (1997).

Abuse of Discretion



Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999).

Not limited to "Scientific"



*Kumho expands
Daubert's basic touchstones*

testability

peer review/publication

known error rate

*standards controlling technique's
operation*

general acceptance



scientific

vs.

personal knowledge, experience



Kumho & § 907.02
two part test – spillover



1. relevant



2. reliable



“Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. . . . In other cases, the relevant reliability concerns may focus upon personal knowledge or experience.”

drug terms

agricultural practices

land valuation

handwriting analysis

railroad procedures

perfume tester

criminal modus operandi

attorney's fee valuation



no checklist particularly for the
“soft” sciences

no definitive checklist,
case specific, but still look to
science



“The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence.”



“Our emphasis on the word ‘may’ thus reflects *Daubert*’s description of the Rule 702 inquiry as ‘a flexible one.’ *Daubert* makes clear that the factors it mentions do *not* constitute a ‘definitive checklist or test.’ And *Daubert* adds that the gatekeeping inquiry must be ‘tied to the facts’ of a particular ‘case.’”



“At the same time, and contrary to the Court of Appeals' view, some of *Daubert* `s questions can help to evaluate the reliability even of experience-based testimony. . . . for example, how often an engineering expert's experience based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, . . . whether his preparation is of a kind that others in the field would recognize as acceptable.”

Starting Points

Substantive Soft Science Research

(in addition to your own expert)



Search


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☒ Articles (☒ include patents) ☐ Legal opinions and journals


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[An investigation of factors contributing to consumer **brand confusion**](#)
 ER Foxman, DD Muehling... - Journal of Consumer ..., 1990 - Wiley Online Library
 A quick glance at the shelves of grocery and drug stores shows that many consumer goods companies are employing what has been referred to as an "imitation strategy." Imitation strategies involve any or all of the marketing mix elements, including price, product, distribution, and ...
[Cited by 82](#) - [Related articles](#) - [All 3 versions](#)

[Brand confusion: empirical study of a legal concept](#)
 J Kapferer - Psychology and Marketing, 1995 - Wiley Online Library
 Abstract Each year, hundreds of own-label products appear on the shelves of major multiple retailers that "look" like successful brands. The close imitation of a national **brand** trade dress aims at creating a "halo of resemblance," on the basis of which consumers may ...
[Cited by 65](#) - [Related articles](#) - [BL Direct](#) - [All 3 versions](#)

[Consumer **brand confusion**: A conceptual framework](#)
 ER Foxman, PW Berger... - Psychology and Marketing, 1992 - Wiley Online Library
 Abstract A definition and theoretical framework for consumer **brand confusion** are developed. **Brand confusion** is distinguished from related terms, such as uncertainty, miscomprehension, infringement, and deception. The factors affecting the likelihood of ...
[Cited by 54](#) - [Related articles](#) - [All 3 versions](#)

[Consumer **confusion** from own **brand** lookalikes: an exploratory investigation](#)
 G Balabanis... - Journal of Marketing Management, 1997 - Taylor & Francis
 Lookalikes are a new generation of own **brand** products that have similar packaging and labelling characteristics to leading branded products. Their current success and proliferation (in Britain) has raised ethical and legal issues about whether they confuse consumers. A ...
[Cited by 46](#) - [Related articles](#) - [BL Direct](#) - [All 3 versions](#)

[Brand confusion](#)
 KJ Clancy... - Harvard Business Review, 2002 - mendeley.com
 Abstract The article discusses **brand** management, especially product or **brand** differentiation. Copernicus, a marketing consulting firm in Massachusetts, and Market Facts, which is based in Chicago, researched the public's perception of brands and product ...
[Cited by 21](#) - [Related articles](#) - [Cached](#) - [All 5 versions](#)

[The impact of consumer characteristics and campaign related factors on **brand confusion** in print advertising](#)
 M Brengman, M Geuens... - Journal of Marketing ..., 2001 - Taylor & Francis
Brand confusion takes place when a recipient views an advertisement for a particular **brand**

Websites for Professional Organizations

The screenshot shows the homepage of the American Psychological Association (APA) website. At the top, the APA logo and name are displayed, along with navigation links for Home, Help, Log In, and MORE APA WEB SITES. A horizontal menu bar contains links for About APA, Psychology Topics, Publications, Psychology Help Center, News & Events, Research, Education, Careers, and Membership. Below this is a search bar with a dropdown menu set to 'Entire Site' and a 'GO' button. A shopping cart icon is also present.

The main content area features a large banner for 'Seasonal Affective Disorder' with the text 'YOUR MIND YOUR BODY' and 'What are the symptoms and how to treat it'. To the right of the banner is a 'MyAPA' login section with fields for User ID (User Name or E-mail) and Password, a 'Remember my user ID' checkbox, a 'LOG IN' button, and a link for 'Problem with login?'. Below the login section are links for 'Become a member', 'Renew your membership', and 'Public user registration'.

Below the banner, there are three main sections: 'Practice Central', 'Psychology Topics', and 'Publications'. 'Practice Central' provides resources for practitioners from the APA Practice Organization, with a link to 'Go to Practice Central'. 'Psychology Topics' lists various topics including ADHD, Aging, Alzheimer's, Anger, Anxiety, Autism, Bipolar Disorder, Bullying, Children, Death & Dying, Eating Disorders, Emotional Health, Ethics, Hate Crimes, Sexuality, Therapy, Trauma, and Workplace Issues, with a link to 'More topics'. 'Publications' lists various publications including APA Books, Magination Press Children's Books, APA and Affiliated Journals, Magazines and Newsletters, Reports & Brochures, and APA Videos, with a link to 'Go to publications'.

Below these sections, there are three more sections: 'Quick Links', 'News & Events', and 'Databases'. 'Quick Links' lists various links such as APA Style, Continuing Education, Convention, Divisions, Find a Psychologist, Programs and Directorates, PsycCareers, Government Relations, Scholarships, Grants & Awards, and Giving Opportunities. 'News & Events' features a section for 'APA in the News' with a link to 'RSS Feed', listing various news items such as 'Willpower's secret weapon? Sugar', 'The psychology of resolutions', 'Broke your New Year's resolution already? Don't stress', 'Hiding emotion in plain sight', 'How to become an optimist in 2012', and 'Married couple shares the love, wisdom', with a link to 'Additional stories'. 'Databases' lists various databases including PsycINFO, PsycARTICLES, PsycBOOKS, PsycEXTRA, PsycCRITIQUES, PsycTESTS, and PsycTHERAPY, with a link to 'Go to databases'.

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☐ [Determining an appropriate cutting score for indication of impairment on the Montreal Cognitive Assessment.](#)

1. Waldron-Perrine B, Axelrod BN.
Int J Geriatr Psychiatry. 2012 Jan 9. doi: 10.1002/gps.3768. [Epub ahead of print]
PMID: 22228412 [PubMed - as supplied by publisher]
[Related citations](#)

☐ [What predicts cognitive decline in de novo Parkinson's disease?](#)

2. Arnaldi D, Campus C, Ferrara M, Famà F, Picco A, De Carli F, Accardo J, Brugnolo A, Sambucetti G, Morbelli S, Nobili F.
Neurobiol Aging. 2012 Jan 5. [Epub ahead of print]
PMID: 22226489 [PubMed - as supplied by publisher]
[Related citations](#)

☐ [Writing errors in ALS related to loss of neuronal integrity in the anterior cingulate gyrus.](#)

3. Yabe I, Tsuji-Akimoto S, Shiga T, Hamada S, Hirata K, Otsuki M, Kuge Y, Tamaki N, Sasaki H.
J Neurol Sci. 2012 Jan 4. [Epub ahead of print]
PMID: 22226010 [PubMed - as supplied by publisher]
[Related citations](#)

☐ [Perioperative inflammatory response and protein S-100 \$\beta\$ concentrations - relationship with post-operative cognitive dysfunction in elderly patients.](#)

4. Li YC, Xi CH, An YF, Dong WH, Zhou M.
Acta Anaesthesiol Scand. 2012 Jan 9. doi: 10.1111/j.1399-6576.2011.02616.x. [Epub ahead of print]
PMID: 22224444 [PubMed - as supplied by publisher]
[Related citations](#)

☐ [\[The use of neyromidin in patients with minor ischemic stroke\].](#)

5. [No authors listed]
Zh Nevrol Psikhiatr Im S S Korsakova. 2011;111(8 Pt 2):35-40. Russian.
PMID: 22224243 [PubMed - in process]
[Related citations](#)

☐ [Neuropsychological screening performance and the association with activities of daily living and instrumental activities of daily living in dementia: baseline and 18- to 24-month follow-up.](#)

6. Monaci L, Morris RG.
Int J Geriatr Psychiatry. 2012 Feb;27(2):197-204. doi: 10.1002/gps.2709. Epub 2011 Mar 29.
PMID: 22223145 [PubMed - in process]
[Related citations](#)

☐ [Characteristics and clinical correlates of prospective memory performance in first-episode schizophrenia.](#)

7. Zhou FC, Xiang YT, Wang CY, Dickerson F, Au RW, Zhou JJ, Zhou Y, Shum DH, Chiu HF, Man D, Lee EH, Yu X, Chan R, Ding Z, et al.
Schizophr Bull. 2012 Jan 1. [Epub ahead of print]
PMID: 22223145 [PubMed - in process]
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The assessment of neuropsychological functioning in sch [Dialogues Clin Neurosci. 2010]

The assessment of changes in cognitive functioning: r [Dement Geriatr Cogn Disord. 2010]

Neuropsychological assessment of the orbital and ventromedial prefrontal cortex [Neuropsychologia. 2010]

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Neurocognitive correlates of apathy and anxiety in Parkinson's disease. [Parkinsons Dis. 2012]

Depression is associated with cognitive dysfunction [Cardiovasc Psychiatry Neurol. 2011]

Chronic obstructive pulmonary disease is associated with cognitive dysfunction [Dement Geriatr Cogn Dis Extra. 2011]

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"Soft Subjects"

Daubert Factors Most in Play for Soft Science

Trustworthy Facts

Reliable Application Of Methodology

**Generally Accepted/Peer
Review/Publication**

Existence Of Standards/Controls

**Accepted Premise To Unfounded
Conclusion**

**Accounted For Obvious Alternative
Explanations**

Some Soft Science Examples

Vocational Rehabilitation

Elcock v. Kmart Corp., 233 F.3d 734 (3rd Cir. 2000).

Ammons v. Aramark, 368 F.3d 809 (7th Cir. 2004).

Elcock v. Kmart, 3rd Circuit



Elcock v. Kmart, 3rd Cir.

- \$650K damages
- Vocational rehabilitation “expert” Dr. Copemann:
 - Depression, pain disorder, adjustment disorder with anxiety
 - Caused by slip-and-fall and physical injuries therefrom
 - 50-60% disabled

Elcock v. Kmart – Defense Attack

On voir dire, Copemann admits:

- he has neither academic training nor standard credentials to qualify as VR expert;
- his experience on WC boards not include assessing range of jobs for injured individuals;
- his experience was dated.

Elcock v. Kmart

Plaintiff's rebuttal:

- because no formal VR training, rely on “practical experience” to demonstrate qualifications;
- “kept abreast of literature in field”;
- when testifying as expert in similar matters, Copemann has performed VR assessments.

Elcock v. Kmart - 3rd Cir.

- District Court – admits Copemann's testimony.
- On appeal, defense argues:
 1. Method is idiosyncratic – cannot be duplicated nor tested for validity (1st and 4th Daubert factors)

Elcock v. Kmart - 3rd Cir.

- District Court – admits Copemann’s testimony.
- On appeal, defense argues:

2. Copemann admits he employed untested, novel method for performing VR – a mixture of “Fields” and “Gamboa” (5th and 6th Daubert factors)

Elcock v. Kmart - 3rd Cir.

On appeal, defense argues:

3. Thin qualifications (7th Daubert factor)
4. Application of hybrid method unreliable on its face.

Third Circuit: vacates district court's decision to admit Copemann's testimony.

Elcock v. Kmart - 3rd Cir.

Footnote: Copemann's federal criminal conviction (18 U.S.C. § 641 – embezzlement) .

Considered as part of Daubert assessment of reliability of his methods?

What do you think?

Elcock v. Kmart - 3rd Cir.

Footnote: Copemann's federal criminal conviction (18 U.S.C. § 641 – embezzlement) .

Considered as part of Daubert assessment of reliability of his methods?

NO.

Not “never consider” – FRE 104(a) (crime of dishonesty).

But not as part of “reliability of his methods” analysis.

Vocational Rehabilitation

Elcock v. Kmart Corp., 233 F.3d 734 (3rd Cir. 2000).

Ammons v. Aramark, 368 F.3d 809 (7th Cir. 2004).

Ammons v. Aramark – 7th Cir.



Ammons v. Aramark – 7th Cir.

- Returns to work on light duty.
- One month later withdrew from work; medical leave of absence.
- F(x)al capacity evaluation of a Dr. Krieger: Ammons reached maximum medical improvement; knee damage permanent; not return to normal duties; restricted to light-medium work.

Ammons v. Aramark – 7th Cir.

Susan Enterberg: vocational rehabilitation counselor.

1. Ammons' work required heavy exertion.
2. Ammons not capable of returning to his position.
3. Aramark could accommodate Ammons' condition.

Ammons v. Aramark – 7th Cir.

- Ammons asks to return to work.
- Aramark's director of employment rejected Ammons' request to return to work, relying on:
 - Entenberg's report
 - Dr. Krieger's assessment
- Duties proposed for Ammons were too limited.

Ammons v. Aramark – 7th Cir.

- Because Ammons on medical leave of absence for > 18 months, Aramark terminated Ammons.
- Ammons sues Aramark alleging termination violated his rights under ADA – Ammons continues to want to return to work.
- Ammons puts forth **Susan Enterberg** as an expert.

Ammons v. Aramark – 7th Cir.

- “Although in her 1998 report Entenberg concluded that Ammons was not capable of returning to his past work, she has apparently since that time reached a different conclusion.”
- Entenberg concluded in her expert report and deposition that Ammons **could perform “the vast majority” of his job functions.**

“Expert” Entenberg’s Change

- Primarily on tour of Chicago facility.
- Meetings she held with supervisors.
- She did not interview Ammons a 2nd time.
- She did not review deposition testimony of other Aramark witnesses.

Ammons v. Aramark – 7th Cir.

District Court:

Entenberg's expert report was not reliable.

She:

- (a) did not observe all equipment Ammons called on to repair;
- (b) failed to review depositions;
- (c) did not reinterview Ammons.

Therefore, report was speculative.

Ammons v. Aramark – 7th Cir.

Court of Appeals:

No question re: Entenberg's qualifications.

No question re: Entenberg's proposed testimony is reliable.

But testimony was speculative
for same reasons listed by district court.

Ammons v. Aramark – 7th Cir.

Query:

If Entenberg had observed, reviewed, reinterviewed, would her testimony have been speculative?

DISTRICT COURT DECISION



Accounting/Economics

Trustworthy Facts

**Reliable Application Of
Methodology**

**Accepted Premise To
Unfounded Conclusion**

**Accounted For Obvious
Alternative Explanations**

Trustworthy Data

Ariens Co. v. Woods Equipment Co., 2006 WL 2597979 (E.D. Wis.)

- Expert Report: “For purposes of my damage analysis, ... I am relying upon [Defendant’s] management representations that the drop off in Mow’n Machine sales was caused by not having current models.”
- “Of course what [Expert] assumes is the *crucial* matter of the moment. The starting point for any lost future profits analysis is the projection of future sales.”
- “In other words, can a corporate executive testify to lost profits-as a lay witness-when those profits are based not on existing data but on projections of future sales? The answer, I conclude, is no.”



Trustworthy, Verified Data

Lyman v. St. Jude Medical S.C., Inc., 580 F. Supp. 2d 719 (E.D. Wis. 2008)

- The basis for Defense Expert's lost profits projection was summary of Plaintiff's sales data from Defendant's data base
- Opinion struck because expert "did not independently verify the source and accuracy of the data." [Expert] did crosscheck the information against other documents, but the bottom line is that [Expert] never talked to anyone at [Defendant] to verify the accuracy of the information in any of the documents he reviewed. [Expert's] information was received solely from [Defendant's] counsel."
- "Further undercutting the reliability of [expert's] opinions and projections is the fact that [expert] never talked to a single [Defendant] employee about the facts of this case."

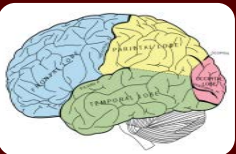


Reliable Application of Method/ Account for Alternative Explanations

Manpower, Inc. v. Insurance Company Of Pennsylvania,
2010 WL 3730968 (E.D. Wis.)

- [Expert's] calculations are thus straightforward. However, whether these calculations produce a reliable measurement of [Plaintiff's] loss turns on whether [Expert] used reliable methods when selecting the numbers used in his calculations ..."
- "[Expert] did little more than assume that the growth that [Plaintiff] had experienced during the five months before the collapse was the result of new management and thus would continue unabated for the next fourteen months."
- "had [Expert] not chosen such a short base period for calculating lost revenues, I might have found his analysis reliable."





Neuropsychology/Psychology

**Reliable Application Of
Methodology**

**Generally Accepted/Peer
Review/Publication**

**Accepted Premise To
Unfounded Conclusion**

**Accounted For Obvious
Alternative Explanations**

Existence of Standards/Controls

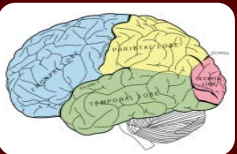
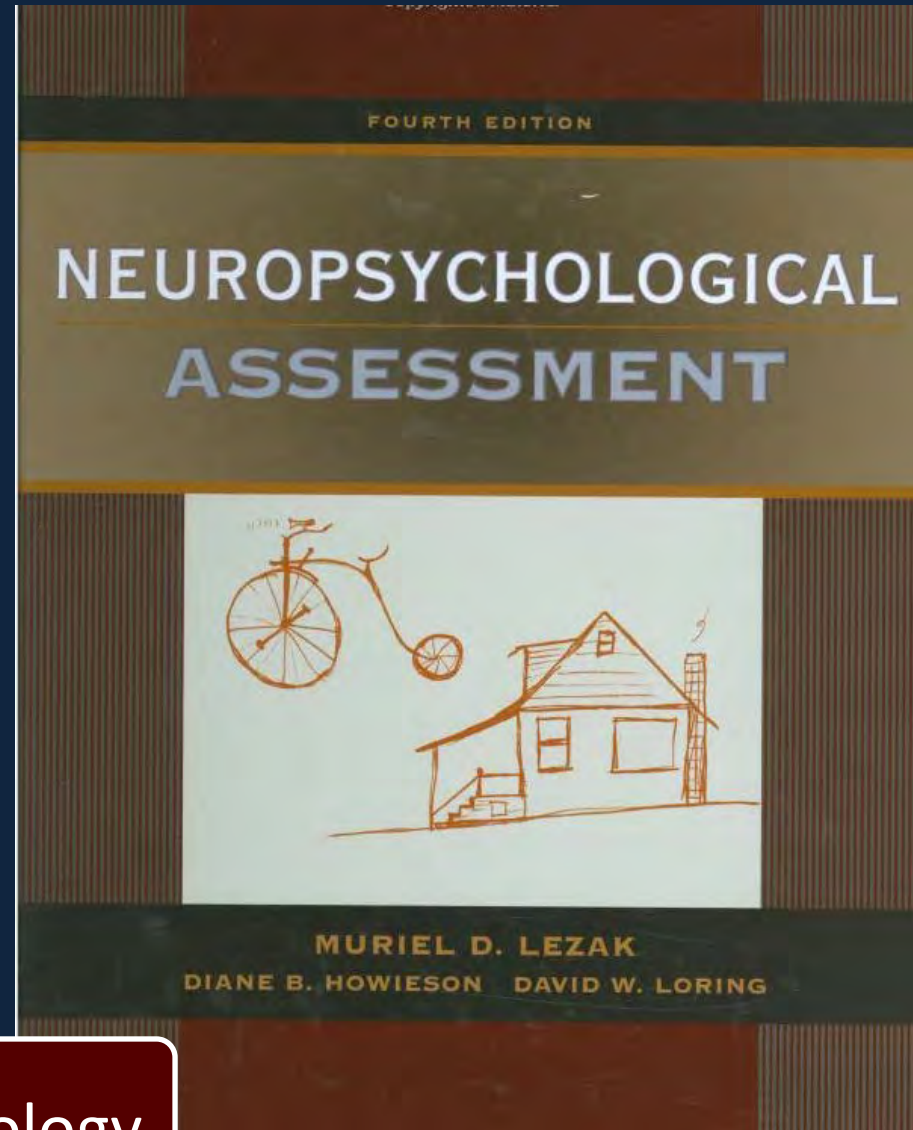
Neuropsychological Testing

Appropriate test protocol

Appropriate baseline

Impairment criteria

- At least 1 Standard Deviation
- Multiple findings below baseline



Neuropsychology/Psychology

Method: ipse dixit/ Account for Other Explanations

Smith v. DeBeers, 2006 WL2253073 (E.D. Wis.)

- Unlicensed Dr. [Psychologist] based opinion of PTSD and depression arising from sexual assault on a 8.5-hour clinical interview, lasting about 8.5 hours, the results of two neuropsych tests, and review of investigative and court documents
- Dr. [Psychologist] able to testify about the plaintiff's emotional state, but could not testify as to connection between current state and alleged sexual assault.
- “proposed testimony is grounded, not on his expertise or scientific analysis, but on the plaintiff's version of the events of October 5, 2001, and her resultant experiences at work.”
- “There is no indication that Dr. [Psychologist] considered and rejected whether other factors may have contributed to the plaintiff's emotional trauma and depression.”



Facts/Methods/Qualification

Steffy v. Cole Vision Corp., 2008 WL 7053517(E.D. Wis.)

- PTSD and Major Depression ADA Reasonable Accommodation Claim
- Defendant argued that long-time treating clinical Psychologist not qualified to diagnose due to lack of specialized training in PTSD and Depression
- Diagnosis testimony allowed because based on sufficient facts and data and testing method reliable
- No EXPERT testimony as to ultimate issues of whether Plaintiff “disabled” and “reasonable accommodation” - -- lack of qualification



Daubert, Kumho, and Soft Science

- Hypotheses difficult to test
- Limitations on social sciences should not change essential legal analysis.
- In every scientific field, hard and soft, hypotheses defy direct observation or straightforward testing.
- Daubert and Kumho exhort scientists, hard and soft, to “do good science” and be scientists first, expert witnesses and advocates second.