Daubert on the Road

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I. Scope of Paper

There are thousands of automobile accidents every year in Texas and many of them are attributable to drivers' negligence. When those negligent drivers are brought to court, oftentimes due to the death or terrible injury of another, there is a question as to whether expert testimony regarding the accident is admissible. Federal and state courts and legislatures have set in place rules and guidelines to direct trial courts in whether an expert's testimony is admissible. This paper summarizes recent cases which discuss admissibility of expert witnesses in suits involving automobile and truck wrecks.

II. Standards for Admissibility

A. Federal

In 1993, the U.S. Supreme Court set forth a list of factors trial courts were to use in determining whether an expert's scientific testimony is admissible. These factors are: (1) whether the theory or technique has been scientifically tested; (2) whether the theory or technique has been published or subject to peer review; (3) that particular technique's rate of error; and (4) whether the theory has been accepted in the scientific community. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). The Federal Rules of Evidence 702, was amended on December 1, 2000 in an effort to incorporate the *Daubert* factors, and states that "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, provided that (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 to the facts of the

case.''

Later, in *Kuhmo Tire*, the Supreme Court held that the *Daubert* factors apply to all expert testimony and not exclusively scientific matters. *Kuhmo Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Kuhmo Tire* also instructs that every case is unique and the presence or absence of a particular *Daubert* factor does not necessarily indicate reliability or lack thereof. *Id.* Particular cases may require only particular factors. *Id.*

B. State

Texas standards regarding the admissibility of expert testimony are reflected in the Texas Rules of Evidence provision which states that 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.'' TEX.R.EVID. 702. The question of whether a witness is qualified to the extent to be an ''expert'' is within the trial court's discretion. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex.1995). In addition, an expert's scientific testimony must be reliable and relevant. In *Robinson*, the Texas Supreme Court listed 6 non-exclusive factors to consider when determining the reliability of the expert testimony: (1) the extent to which the theory has or can be tested; (2) the extent to which the technique relied upon subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonjudicial uses that have been made of the theory or technique. *Id.* at 557. Three years later, the Supreme Court of Texas held that the relevancy and reliability factors are applicable to all expert testimony, not just scientific testimony. *Gammill v. Jack Williams Chev., Inc.*, 972 S.W.2d 713, 726 (Tex.1998). In addition, the Court found that the *Robinson* factors do not always apply and that

"[e]xperience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case." *Id.* In these situations, a court must determine whether there is too great of an "analytical gap" between the expert's opinion and the facts. *Id.*

III. Testimony From Accident Reconstructionists

Many times a party will call an expert to testify regarding the reconstruction of the wreck in order to prove causation, negligence, fault, timing, etc. But in order to admit the testimony, the expert must be qualified in accident reconstruction, a matter for the court's determination.

A. Federal Cases (all post-*Daubert*)

1. Testimony Allowed

In *Babcock v. General Motors Corp.*, 299 F.3d 60 (1st Cir. 2002), the Court held that the district court did not err in admitting the plaintiff's accident reconstructionist testimony. This expert determined the impact speed by using a technology that is accepted by all recognized accident reconstructionsts and a methodology that is accepted by the National Highway Traffic Safety Administration. *Id.* He then went on to explain that the seatbelt unbuckled due to a design defect called false latching. *Id.* This testimony was found to be both relevant and reliable. *Id.*

In *Clay v. Ford Motor Co.*, 215 F.3d 663 (6th Cir.), *cert. denied*, 531 U.S. 1044 (2000), the Court found (1) the plaintiff's expert to be qualified as an accident reconstructionist (he had a doctorate in mechanical engineering and has been a consultant in accident reconstruction for over 15 years) and (2) his testimony was relevant and reliable under *Daubert* and *Kumho Tire.* Ford claimed the expert's testimony was

"cavalier" because he did not inspect the vehicle and visited the accident scene only one day before he testified, but they did not indicate why these two facts rendered the testimony inadmissible. *Id.* Although Ford also argued that the expert did not test his theories, the manufacturer never challenged "the principle that dynamics can be used to analyze vehicle designs and predict their motion." *Id.* Thus the trial court did not err in admitting the expert's testimony.

In *Edic v. Century Prods. Co.*, No. 03-10486 (11th Cir. Mar. 31, 2004) the Court found that expert testimony from two expert witnesses was admissible. The first witness called into question an eyewitness's ability to have actually seen the accident occur since the entire incident transpired in less than one-tenth of a second. *Id.* The second witness offered his opinions that the accident happened too quickly for an eye witness to be sure of what occurred and that plaintiff's injuries were inflicted while still in the vehicle. *Id.* The Edics argued that the district court erred in not explaining its *Daubert* analysis when it allowed the testimony, but the Court found no authority that required such an explanation. *Id.* The Edics also argued that the experts improperly altered their expert reports to add information not initially available. *Id.* This argument was rejected because (1) they did not specify which statements they objected to, and (2) they did not show how those statements were prejudicial against them. *Id.*

In *Smith v. BMW North Am., Inc.,* 308 F.3d 913 (8th Cir. 2002), the Court of Appeals reversed the trial court's exclusion of plaintiff's accident reconstructionist. While the district court found that the expert's estimate of the principal direction of force was contradicted by visible damage and physics, the Court of Appeals found that the expert had based his

estimate on all the information that he could obtain, and that neither contrary testimony offered by the defendant's expert nor the trial court's impression that his demonstration was hastily proposed were valid bases for excluding the evidence. *Id.* The Court of Appeals did find the portion of the expert's opinion regarding frontal displacement to be flawed and inadmissible because he did not account for "free space" or "air gaps" in using a method that was acceptable. *Id.*

In *Clark v. Chrysler Corp.*, 310 F.3d (6th Cir. 2002), the Court affirmed the admissibility of the testimony of the plaintiff's accident reconstructionist and a door latch expert. Defendant used similar objections for both experts: their opinions were based only on physical examinations and not on their own testing, and the experts produced no test results. *Id.* The Court found the testimony admissible due to (1) the reliability of the testimony (based upon the experts' vast experience and knowledge of their respective topics); (2) the fact the testimony was based on an examination of the scene of the accident, the police report, depositions, and the vehicle; and (3) the fact the experts provided the specific details on which they based their opinions, including tests that were generally accepted at the time the vehicle was manufactured. *Id.*

In *Jodoin v. Toyota Motor Corp.,* 284 F.3d 272 (1st Cir. 2002), the Court reversed the district court's exclusion of expert testimony regarding testing of the exemplar vehicle. The district court excluded the testimony because plaintiff could not prove that the exemplar vehicle used for reconstruction was "virtually identical" to the truck involved in the accident. *Id.* The Court found that "virtually identical" was the incorrect legal standard to use; the proper standard was found to be the substantial similarity test because the testing of the

exemplar vehicle would be perceived as an accident reconstruction. *Id.* The evidence showed that the vehicles were essentially the same at the time of manufacture, and the expert testified that he inspected the exemplar vehicle for everything related to the issues he would be evaluating. *Id.* Thus, the plaintiff passed the substantial similarity test. *Id.*

In *Thomson v. Rook*, 255 F.Supp.2d 584 (E.D. Tex. 2001), the plaintiffs presented their expert who was a registered Professional Engineer in the State of Texas, having both a Bachelor of Science and a Master of Science degree in Mechanical Engineering. He had spent the past 27 years as a "forensic engineer," had been involved in 3000 lawsuits, had testified in court over 260 times, had given deposition testimony in over 130 suits, and he allocated 60 percent of his practice to automobile accident reconstruction. *Id.* The court allowed his testimony as an expert even though he had never taken any courses, received any certification, or taught or published in the specific field of heavy truck/ automobile accident reconstruction. *Id.* The expert's opinion was that the accident would not have occurred had the Defendant (1) been driving at or below the posted speed limit or (2) had not maneuvered into the center lane. *Id.* The Defendant objected on the grounds that the expert's testimony could not pass the *Daubert* test. *Id.*

The court concluded that there were articles, books, and other experts in the automobile accident reconstruction field that validate the present expert's methodology. *Id.* In addition, the expert's opinions provided a basis for the expert to reliably state his conclusions which would assist the triers of fact to determine a fact in issue. *Id.* Although the expert's report did not discuss all the variables that may have been present at the scene of the accident, he showed he was aware of the variables. The court stated that this

factor went to weight of the testimony instead of admissibility. *Id.*

In *Bocanegra v. Vicmar Services, Inc.*, 320 F.3d 581, (5th Cir. 2003), the trial court excluded two expert reports that addressed both the effect marijuana use and the cause of the accident. It was held the reports did not pass the *Daubert* test, did not prove causal connection between marijuana and the incident, and did not prove the driver was impaired because quantity and quality of marijuana was unknown. The Fifth Circuit reversed, holding that the trial court erred in excluding the report because the driver admitted he had ingested marijuana within a twelve hour period prior to the accident, the expert showed published and accepted studies that demonstrated marijuana's effects on cognitive functions, and corroborated that the expert's knowledge and training in toxicology would have been helpful to a fact finder. *Id.* at 587. Concerning the quality or quantity of marijuana the driver used, the Court found that, while there are certain variables that will always be present (such as exact dosage), individuals smoke marijuana to get high, and a person who takes "five or six hits," as the driver did here, will be impaired. *Id.* at 589. The question of degree of impairment goes to the weight given to the testimony, not its admissibility. *Id.* Thus, the Court of Appeals found the trial court's exclusion to be an abuse of discretion. *Id.* at 590.

2. *Testimony Not Allowed*

In *J.B. Hunt Transp. V. General Motors Corp.*, 243 F.3d 441 (8th Cir. 2001) the district court excluded the plaintiff's accident reconstructionist testimony because it was contrary to uncontradicted eye witness testimony and, under *Daubert,* it did not have scientific support. This Court opined that the testimony was not scientifically sound

because it was based on the expert's impressions of photographs of paint scratches on the vehicles involved in the collision. *Id.* In fact, the expert stated that he had insufficient evidence to reconstruct the accident. *Id.* Thus, this expert's conclusions were pure speculation. *Id.*

Likewise, in *Zaremba v. General Motors Corp.* 360 F.3d 355 (2nd Cir. 2004) the district court excluded testimony of accident reconstructionist who had not examined or tested the vehicle, made no measurements or calculations to support his accident reconstruction or his alternative vehicle design (there was no model or testing of his alternative vehicle design), had not subjected his design to peer review and evaluation, and he lacked evidence that other automobile designers accepted his untested propositions. The Court of Appeals found that the reconstructionist had not satisfied any of the factors set forth in *Daubert*.

In *Guidroz-Brault v. Missouri Pacific Railroad Co.*, 254 F.3d 825 (9th Cir. 2001), the trial court properly excluded expert testimony from several expert witnesses. The first expert was qualified but some of his testimony lacked a factual basis. He was heavily qualified to opine regarding railroad operating procedure and only the standards of care he stated were admissible. *Id.* Another expert's opinion that a proper lookout could have seen the broken rail was correctly excluded because it was not sufficiently fact-based as to be reliable. *Id.* In addition, his testimony was at odds with the first expert's opinion and the court stated "exclusion under *Daubert* is appropriate in that the reliability of the methodology used…to reach their conclusions is not only disputed but at odds with one another." *Id.* The third expert, an accident reconstructionist, offered an opinion on the

issue of negligence that was deemed inadmissible because he too lacked factual support of his opinion. *Id.*

In *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000), an expert was limited to lay opinion because he was not timely designated. The appellant argued that the trial court improperly allowed several expert opinions from the witness in question. The Court of Appeals held that it was error to admit the testimony, and that the expert's report was not admissible as a business record. *Id.* It was improper for the witness to answer hypothetical questions that requiring specialized knowledge when he did not have first-hand knowledge of the accident and his opinions were not those which a layman would normally form from his or her own perceptions. *Id.* In addition, the Appeals Court found the accident report was untrustworthy and inadmissible because it had been prepared for the sole purpose of litigation. *Id.*

In *Wilson v. Woods* 163 F.3d 935 (5th Cir. 1999), where an 18-wheel truck struck an automobile, Ms. Wilson called an expert in accident reconstruction in order to support her theory that the adverse driver was exceeding the speed limit when the accident occurred. The expert had a Bachelor of Science and a Master of Science degrees in mechanical engineering. *Id.* Although in the past 25 years the expert's consulting work had focused on fire reconstruction and investigation, he had recently shifted his emphasis to automobile accident reconstruction. *Id.* Voir dire of the expert revealed that although he taught college level courses, he had never held professional rank, he had never taught an accident reconstruction course, and had no degree or certification in accident reconstruction. At least one other court had refused to qualify him as an expert in vehicle

accident reconstruction based on his lack of qualifications. *Id.* The district court then questioned the witness and discovered that he had never conducted any studies or experiments in the field of accident reconstruction, had taken no measurements or data from the accident, had based his calculations on publicly accessible data, and was unable to show that his training and experience as a mechanical engineer gave him any expertise in the area of accident reconstruction. *Id.* The court refused to qualify him as an expert because his "expertise" in accident reconstruction was no more than anyone else with a background in science. *Id.*

B. State Cases

1. *Testimony Allowed* (all post-*Robinson*)

Yarbrough's Dirt Pit, Inc. v. Turner, 65 S.W.3d 210, 214 (Tex.App - Beaumont 2001, no pet.), affirmed the use of that accident reconstruction testimony concerning fault or lack of fault. Here a party used the deposition testimony of two expert witnesses to testify regarding whether the party was contributorily negligent in causing the car wreck. *Id.* The opposing party objected on the basis that the expert's testimony regarding contributory negligence held no weight and was conclusory. *Id.* The court found that the testimony did have weight, and that such testimony could be probative evidence of fault or lack of fault. *Id.*

One of the expert witnesses was actually designated as an expert by the opposing party. The Court of Appeals held that a conclusion by a expert hired by an adverse party is similar to an admission by a party opponent. *Id; see generally* Tex.R.Evid. 801(e)(2). The court held that a conclusion of an expert witness hired by an opposing party to speak on

the subject matter on behalf of the party opponent is admissible against the party opponent, and the conclusion may be relied even if the opposing expert witness did not disclose the basis for the conclusion. *Id.*

2. *Testimony Not Allowed* (all post-*Robinson*)

In *The Goodyear Tire & Rubber Co. v. Rios*, No. 04-02-00574-CV (Tex.App. – San Antonio Feb. 25, 2004) 2004 WL 343541, the plaintiffs offered the testimony of two experts to establish the existence of a manufacturing defect in the tires. The first expert based his opinion on demonstrable facts that he collected through touch and vision, coming to the conclusion that the tire tread separated due to a manufacturing defect. *Id.* This testimony was found to be unreasonable because there was no evidence that other experts in the industry use this touch/vision method to differentiate a defect from normal use and abuse over time. In addition, the testimony did not refer to any articles or publications that supported the method the expert used. *Id.* The Court also held that the second witness was not qualified as an expert because, although his background qualified him to discuss adhesion failures in a general sense, he was not qualified to discuss whether this tire failed because at the time of manufacture an adhesion defect existed. *Id.*

IV. Testimony From Investigating Police Officers

Based on their position as police officers alone, police officers are not qualified to testify as experts regarding accidents. *Lopez v. Southern Pacific Transp. Co.*, 847 S.W.2d 330 (Tex.App. – El Paso 1993, no writ). However, police officers are qualified to testify regarding accident reconstruction if they are trained in the science about which they will testify and possess the high degree of knowledge. Further, a police officer who

investigated an accident scene may not testify as to other matters relating to the accident.

A. State

1. *Testimony Allowed*

a. Pre-*Robinson*

In *Rogers v. Gonzales*, it is contended that the trial court erred in admitting assorted opinions of the officer who investigated the accident. *Rogers v. Gonzales*, 654 S.W.2d 509 (Tex.App. – Corpus Christi [13th Dist.] 1983, writ ref'd n.r.e.). The officer had seven years experience with the Department of Public Safety, during which he had been involved in accident investigation; he attended a four and one half month course given by the Department of Public Safety that included training in accident investigation; and he went to a one week in-service refresher course every two years. *Id.* at 512. The Court of Appeals held that the officer was qualified as an expert concerning the speed of the van and the driver's evasive actions. *Id.* The fact that he based his opinion in part on hearsay statements made by witnesses and in part on his personal knowledge did not render it inadmissible. *Id.*

In *Pyle v. Southern Pacific Transp. Co.,* 774 S.W.2d 693 (Tex.App. – Houston [1st Dist.] 1989, writ denied) the Court found that the admission of the accident report containing statements of a police officer that appellant disregarded the "Do Not Stop on Tracks" sign was proper. The Court opined that although a police officer is not qualified as an expert to offer an opinion regarding the incident by his position alone, the admission of cumulative testimony, as it was here (there were six witnesses who stated that the driver stopped on the tracks) was not reversibly harmful. *Id.* at 695.

In *Trailways, Inc. v. Clark* 794 S.W.2d 479 (Tex.App. – Corpus Christi 1990, writ denied), a supervisor for the Mexican Federal Police testified as an expert as to the cause of the accident and the speed of the bus. The officer in this case had taken a course which taught him Mexican traffic rules and accidents, had taken several up-date courses concerning traffic accidents, had attended a twelve-day engineering course that supplied him with some knowledge of logistics in accidents, and amidst this training he had learned to determine vehicular speed by studying the skid marks. *Id.* The Court of Appeals held that admitting the officer's testimony as to the speed of the vehicle and its role in causing the accident was correct. *Id.* at 483.

In *DeLeon v. Louder* 743 S.W.2d 357 (Tex.App. – Amarillo 1987), *writ denied per curiam*, 754 S.W.2d 148 (Tex. 1988), pre-*Daubert* and pre-*Robinson,* the Court of Appeals found that it was proper to admit the investigating officer's opinion that the DeLeon vehicle failed to yield the right-of-way to the Louder vehicle and that this was a factor that contributed to the accident. The opinion was admissible because the officer based it upon his six years with the Department, in-service and related schools he had attended, his accident reconstruction training and teaching at the United States Air Force Academy for one year, and the fact that he investigated thirty to fifty accidents annually. *Id.* at 359.

Louder then appealed to the Texas Supreme Court, which denied her writ, but did state that "expert testimony on proximate cause is admissible as long as it is based on proper legal concepts." *Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988).

b. Post-*Robinson*

In *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex.App. – Beaumont 1997, pet. denied),

decided post *Robinson*, the Court of Appeals found that the trial court did not abuse its discretion in finding the investigating Trooper an expert in accident reconstruction and allowing him to testify as to the results of his investigation. The Trooper's experience and education consisted of science and engineering courses, several years experience with the Texas Department of Public Safety, specialized training in accident investigation by attending advanced accident reconstruction school, and, at the time of testimony, having investigated between four and five hundred accidents. *Id.* at 920-921. The Court additionally found that his testimony was essentially confined to his interpretation of the physical evidence, and did not reference the legal liability or fault of either party. *Id.* at 923. The Court of Appeals found that admission of the officer's report was proper because Sciarrilla's objections at trial were generic and not applicable to arguments made on appeal. *Id.* at 924.

As previously discussed, in *Yarbrough's Dirt Pit, Inc. v. Turner*, the court found that the testimony of the officer who investigated the accident could be used as probative evidence of fault or lack of fault. *Yarbrough's Dirt Pit, Inc.,* 65 S.W.3d at 214.

Further, in *Huckaby v. A.G. Perry & Sons, Inc.*, 20 S.W.3d 194, 207-208 (Tex.App. – Texarkana 2000, pet. denied), the Huckabys contended that the trial court had erred in allowing the Trooper who had investigated and reconstructed the accident to testify about the reconstruction and to establish causation because he was not qualified as an expert in highway design. The court stated that the evidence showed the Trooper had assisted in the investigation of over 3800 accidents and had personally signed and approved almost 1300 accident reports in over sixteen years. *Id.* at 208. In addition, a portion of his job

responsibilities was to perceive and report highway design flaws. *Id.* Due to the Trooper's practical experience and knowledge of highway design and the fact that his testimony assisted the trier of fact in determining a fact issue, the court concluded that he was qualified as an expert on highway design and his testimony was admissible. *Id.*

In *Ter-Vartanyan v. R&R Freight*, 111 S.W.3d 779 (Tex.App. – Dallas 2003), there were three issues the court addressed: whether the officer was qualified as an expert, whether his opinions were reliable, and whether his opinions would assist the jury. Ter-Vartanyan was injured when the van she was driving collided with an eighteen-wheeler driven by an employee of R&R Freight. *Id.* In trial, Defendants called as an expert the police officer who investigated the accident, who had been a police officer for eight years, had training in accident investigations, had participated in additional in-service training concerning accident investigations, was certified by the department as an accident investigator, and had investigated hundreds of motor vehicle accidents. *Id.* The Court concluded that Cerda had sufficient knowledge and experience to be an expert. *Id.* The officer then went on to say that the accident was caused by Ter-Vartanyan's inattention. *Id.* Ter-Vartanyan objected that Cerda was not an expert in inattention, but the court found that Cerda's opinion was the result of the investigation and not the area in which the expert needed to be qualified. *Id.*

All expert testimony must be reliable to be admissible, and next Ter-Vartanyan argued that Cerda's testimony was not reliable because "he did virtually nothing to investigate the collision." *Id.* at 782. But the record showed he had gone to the scene of the accident at a time when the vehicles were still situated on the road where the collision

took place, he looked at the scene, took note of the weather, the location of the vehicles, the damage to the vehicles, the posted speed limit, the traffic signals, skid marks, the grade of the road, and the lay of the land. *Id.* He also interviewed the driver of the truck and the only other witness still at the scene when he arrived. *Id.* The Court found Cerda's investigation of the accident was reasonable and that there was "no analytical gap between the data he collected and the opinions he proffered." *Id.* Anything that Cerda did not do in his investigation goes to the weight given to his testimony, and not to admissibility. *Id.* at 183.

2. Testimony Not Allowed

a. Pre-*Robinson*

Estate of Brown v. Masco Corp., 576 S.W.2d 105 (Tex.Civ.App. – Beaumont 1978, writ ref'd n.r.e.), was decided prior to the *Daubert* and *Robinson* decisions. The Court of Appeals found that the police officer who had investigated the accident was not qualified to express his opinion on the ultimate issue of the case because his qualifications consisted of only three days training on accident investigation and having investigated twenty accidents prior to the one in this case. *Id.* at 108. In addition, the Court held that the trial court erred in allowing accident reconstruction testimony, consisting of analyzing each side's contentions and concluding whose was more plausible, from the company representative who had no training or background in accident reconstruction. *Id.*

In *Clark v. Cotton,* 573 S.W.2d 886, 887 (Tex.Civ.App. – Beaumont 1978, writ ref'd n.r.e.), where the Court went by the pre-*Robinson* standard of qualifying an expert "if they are highly trained in the science of which they testify," it was held that the trial court had

properly excluded the State Trooper's testimony. The Trooper had eight and one-half years experience with the Department of Public Safety, seventeen weeks of training, and had investigated 350 accidents. *Id.* But the Court held that he was not qualified to opine as to the ultimate cause of the accident, which was a decision for the jury. *Id.* at 888.

Similarly, in *St. Louis Southwestern R. Co. v. King*, 817 S.W.2d 760 (Tex.App. – Texarkana 1991, no writ), the Court of Appeals found that the trial court did not err in holding that a police officer, who was at the scene immediately following the accident, was not qualified to testify as an expert, and therefore could not offer testimony as to the accident's cause. This was despite the fact that during the trial he testified that he had approximately eight years service with the police department, and attended the police academy and a seminar on accident investigation. *Id.* at 763. The Court stated that the officer was never shown to be an expert and thus he could not offer his opinion. *Id.* at 764. In addition, the court excluded the portions of the officer's police report that dealt with the cause of the collision. This was proper because the officer was not offered as or shown to be an expert. *Id.*

Likewise, in *Lopez v. Southern Pacific Transp. Co.* 847 S.W.2d 330 (Tex.App. – El Paso 1993, no writ) the Court found that the trial court erred in admitting the testimony of a police officer as an accident reconstructionist regarding the cause of the accident. Here the officer had nine years of experience with the Southern Pacific Police Department, he had completed courses on accident investigation and reconstruction while in the Police Academy, he received in-service training on accident investigation and reconstruction, and he had previously investigated train-pedestrian accidents, although he had no formal

training in railroad accident reconstruction. *Id.* at 334-335. Because the officer's testimony was not limited to non-technical aspects of accident reconstruction and because there was no evidence that he possessed any scientific, technical or specialized knowledge that the general layman does not possess, it was held that the jury was in as good a position as the officer to form an opinion about what caused the accident. *Id.* at 335.

b. Post-*Robinson*

In a post-*Daubert* and post-*Robinson* case, *Gainsco County Mut. Ins. Co. v. Martinez*, 27 S.W.3d 97, 104 (Tex.App. – San Antonio 2000, pet. dism'd by agr.), the Court held that the trial court erred in admitting a police officer's testimony regarding vehicle speed and force of impact because there was no evidence of his qualification in accident reconstruction training. The officer admitted that although he had investigated prior accident scenes, he had never received accident reconstruction training, had only four months of experience on the police force and was still in training, and had never investigated an accident fatality before this case. *Id.* at 104-105.

V. Admissibility of Accident Reports

It is a routine procedure that police officers generate written reports in the process of investigating an accident. These accident reports are admissible under Texas Rule of Evidence 803(8) as an exception to the hearsay rules.

A. State

1. Testimony Allowed

In *Ter-Vartanyan*, as discussed above, appellant argued that the report Officer Cerda, who investigated the accident, generated was non-admissible hearsay because it

did not meet the trustworthiness standard. *Ter-Vartanyan*, 111 S.W.3d at 784. Tex.R.Evid. 803(8) provides a hearsay exception for public records, under which a police accident report falls, unless the source of the information or other circumstances indicate a lack of trustworthiness. But the court found that since Officer Cerda was found to be qualified and his testimony reliable, his report was admissible. *Id.* at 784.

In *McRae v. Echols*, 8 S.W.3d 797 (Tex.App. – Waco 2000, pet. denied), McRae asserted that the court erred in admitting an accident report that a peace officer had prepared shortly after the accident. This written report was offered into evidence "as an official record," although the officer did not testify. *Id.* at 799. McRae argues that the report was hearsay and contained opinions not properly predicated. *Id*. The court found that although there was no evidence of lack of trustworthiness in the report, and it was admissible as an exception to the hearsay rule, they still had to determine if the report was based on expert opinion which should have been excluded. *Id.* The Supreme Court has held that "portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's[1] trustworthiness requirement, it should be admissible along with other portions of the report." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988). Here the officer concluded that a contributing factor to the accident was failure to pass to the left safely, including a hand-drawn sketch showing how the accident occurred. *McRae,* 8 S.W.3d 797. The Court of Appeals, finding no reason to distinguish between the Texas

[1] Tex.R.Evid. 803(8) is substantively identical to Fed.R.Evid. 803(8).

Rule 803(8) and Federal Rule 803(8), held that since the officer's opinions and conclusions were based on his factual investigation of the collision, the report was admissible. *Id.*

2. Testimony Not Allowed

In *Hooper v. Torres*, 790 S.W.2d 757, 761 (Tex.App. – El Paso 1990, writ denied), the Court of Appeals found that the trial court did not abuse its discretion in excluding the report and testimony of the investigating officer that concerned whether the two drivers involved in the accident had been driving in an improper or negligent way. The Court found that the exclusion was proper because the officer had not been shown to be qualified as an accident reconstructionist. *Id.* Moreover, the Court found that if the exclusion had been erroneous it would have been harmless because the jury had heard the essential parts of the testimony. *Id.*

The same principles of admission of expert testimony apply in criminal cases as well.

In *DeLarue v. State* 102 S.W.3d 388, 396 (Tex.App. - Hous [14th Dist.] 2003, no pet.) the court declared that "[a]ccident analysts and reconstruction experts may be qualified to testify as to the cause of an accident if they are highly trained in the science of which they testify." In this case, the State's witness, a deputy, offered testimony regarding the vehicle's roll-over sequence and the events occurring within the vehicle at the time of the accident. The argument to exclude this testimony was that the officer was unqualified because he only had six hours of formal training on roll-overs, he failed to quantify the number of accidents he had investigated, he had not conducted any independent studies, and he utilized a manual that had only one chapter out of fifteen

dedicated to roll-overs. *Id.* The court found that he was qualified as an expert due to his practical experience. *Id.* They went on to opine that the deputy was qualified to render an opinion about how the accident happened and who was driving because he performed accident reconstruction on a daily basis as it was his primary job responsibility. *Id.*

In *Pena v. State of Texas* No. 08-02-00361-CR (Tex.App. - El Paso Jan. 29, 2004) the speed of the vehicles involved in the accident was in question. The expert for the State testified that based on his accident reconstruction calculations, he had determined that the initial impacting vehicle's speed was 104 miles per hour. *Id.* The El Paso Court of Appeals found that this testimony was admissible. *Id.* Police officers are deemed to be qualified to testify regarding accident reconstruction if they are trained in the science about which they will testify and possess a high enough degree of knowledge to qualify as an expert. Here the court found that an officer who had been with the police department for twenty years, who had received basic, intermediate, and advanced training in accident reconstruction (including speed reconstruction), who had been certified twice as an expert in accident reconstruction, and who had on many occasions done accident reconstruction for the special traffic investigations section was qualified because he demonstrated that he had special knowledge on accident reconstruction. *Id.*

VI. Conclusion

Case law concerning the admission of expert testimony is copious and confusing. These most recent cases help explain some of the courts' reasoning relating to this area.