

# The Life Care Planner, the Judge and Mr. Daubert

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## I. Introduction

Opinions are usually inadmissible as evidence in a trial. However, for hundreds of years, our Anglo-American common law jurisprudence has admitted expert opinion testimony on matters that are beyond the understanding or knowledge of the average lay person on a jury. There are two predicates for admissibility of opinion testimony. First, it must be relevant to the issues in the trial and, second, the opinion must be reliable, i.e., it must come from someone who is knowledgeable in the field in which the opinion is being expressed and must be scientifically valid.

Until recently, legally speaking, the reliability test was rather loose and easily satisfied. If the witness could demonstrate some degree of knowledge greater than that possessed by the normal person (or judge) in the field under consideration, that person could give wide-ranging opinion testimony. However, by the 1970's, it became apparent that the expert witness concept was being abused. Attorneys had learned that they could plug any hole in a case with an expert witness who would supply, by opinion testimony, evidence that was otherwise nonexistent. And certain people with a little bit of knowledge, some of it accurate and some not so accurate, learned that they could earn a nice income as professional testifiers if they were willing to shape their opinions to fit the needs of the case. Thus, many cases moved from the presentation of fact-intensive lay testimony to the presentation of opinion-intensive expert testimony and battles between dueling experts were waged in courtrooms across the United States.

In 1993, the U.S. Supreme Court said enough is enough; we must have uniform standards for admitting and evaluating expert opinion testimony. Accordingly, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court established four basic guidelines for determining whether scientific testimony from expert witnesses is admissible: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error; and (4) general acceptance within the relevant scientific community.

Technically, those guidelines are applicable only in federal courts because they were established in a federal case by the highest federal court. However, state supreme courts, well aware of the expert witness problem, quickly adopted and sometimes expanded the *Daubert* guidelines in most of the state courts in the United States.

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Texas, in particular, in the decision discussed in detail below, adopted and expanded the *Daubert* guidelines and created a detailed procedure and a rigorous standard that must be satisfied before expert opinion testimony can be admitted in a trial. The Texas standards are generally recognized as the most difficult in the United States to satisfy.

What follows is an excerpt from an amicus curiae (Friend of the Court) brief that has been filed in a case pending in a Texas appellate court where the testimony of a life care planner is under attack. The information is presented in this Journal for two reasons. First, most life care planners will be asked to testify and you need to know what the courts expect from you.

Second, the attorney who is presenting you as a witness will, hopefully, be knowledgeable about the *Daubert* principles in play in his or her state, but may not be particularly knowledgeable about life care planning and planners. Thus, if you make the following information available to the attorney, he or she will be better prepared to qualify you as an expert witness.

The following excerpt is tailored to Texas law, but, with apologies to the song "New York, New York," if you can make it in Texas, you can make it anywhere.

## II.

### Qualification of the Expert Witness

**A. The reliability test.** - Texas Rule of Evidence 702 contains three requirements for the admission of expert testimony: (1) the witness must be qualified; (2) the proposed testimony must be based on scientific, technical or other specialized knowledge; and (3) the testimony must assist the fact finder to understand the evidence or determine a disputed fact.

In *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court established the parameters of Rule 702 and the guidelines for admission of expert opinion testimony.

The Robinsons sued du Pont because they believed a fungicide manufactured by du Pont damaged their pecan orchard. The sole expert witness, a consultant and college professor with impressive credentials in horticulture, plant ecology, and agronomy, concluded after extensive research and testing that an ingredient in du Pont's fungicide was the culprit. However, the trial court excluded the expert's testimony after ruling that it was not scientifically reliable. The case eventually made its way to the Texas Supreme Court, which granted review in order to determine the appropriate standard for admission of expert scientific testimony.

After the Supreme Court reviewed the *Daubert* decision, and other relevant authorities, it formulated the standard for admission of expert testimony, a standard applicable in all Texas courts.

First, agreeing with *Daubert*, the court said the trial judge's role is more than a mere passive spectator. The judge is the gatekeeper who must determine in a preliminary hearing, outside the presence of the jury, whether the expert's opinion is reliable and relevant. When determining reliability, the judge does not determine whether the expert's opinion is correct-that is for the jury-but does decide whether it rests on a reliable foundation. If it does, and if it is relevant to the issues to be decided in the case, then the opinion is admissible.

After clarifying the trial judge's role, the court outlined six non-exclusive factors a trial judge can use to resolve the reliability issue. Each of the six reliability factors is discussed below within the context of life care planning.

**1. The extent to which the theory has been or can be tested.** - This first factor is designed to insure that the area in question is capable of objective study by disinterested persons.

Life Care Planning is not a "theory" in the fashion contemplated herein. It is a tool utilized by Rehabilitation Professionals trained in Nursing, Rehabilitation Counseling, Rehabilitation Psychology, Psychiatry (Physical Medicine and Rehabilitation) and other Health Related Professions applying case management techniques to the benefit of the patient. Life Care Planning is a process by and through which a board eligible or board certified case management professional with life care planning training brings together all of the components necessary to plan for and manage a catastrophic disability. It considers the needs dictated by the onset of the disability, the goals and desires of the patient, the goals of the family, and the realities of the geographic region in which the patient lives.

A Life Care Plan is a dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides an organized concise plan for current and future needs with associated costs, for individuals who have experienced catastrophic injury or have chronic health care needs (Combined definition of Intelicus/University of Florida and the International Academy of Life Care Planners).

The practice of case managers working with individuals who are catastrophically injured and/or have chronic/severe health care needs long predates Life Care Planning. Life Care Planning was developed as a tool to facilitate that practice. It came about as case management became increasingly more complex. Life Care Planning is a direct result of the realization that what was needed was a consistent methodology for analyzing all of the needs dictated by the onset of catastrophic disability through to the end of life expectancy. A methodology that considered the disability, the patient, the family, the process of age and disability combining over time to create phase changes in needs, and further considered the most current research on the disability process. The process also considers the treatment team recommendations based on "needs driven" considerations not just "funded driven" recommendations (i.e., it is not what insurance coverage or government funding options are available but what is realistically necessary).

This tool of Case Management is not a "Scientific Theory" to be subjected to "bench research" in the traditional sense. Studies can be done, but great care must be taken to determine what can and can not be researched. For example, in the rush to research, much has been suggested by the attorneys about research on whether the "costs" predicted in the Life Care Plan have proven accurate. Costs are local and easily checked and replicated. What should be researched in a "validation" study are the needs determined to be dictated by the onset of the disability and the recommendations made within the plan to meet those needs. Are the recommendations consistent with accepted standards? Can they be tied to current published standards? The values tied to these recommendations are dependent on the efficacy of the various entries in the plan and whether the trained Life Care Planner held to accepted standards for

establishing a Medical and Case Management basis for the needs and recommendations which are included in the plan.

In reviewing the current state of research in Case Management and Life Care Planning, it is important to consider the published literature as well as major projects in progress. A familiarity with the existing published literature is helpful in providing insights into the issues, methodological approaches and outcomes of past and current research. A brief overview of several of the major projects currently underway will be helpful in providing insight into the direction Life Care Planning is moving as researchers work to complete new studies on reliability and validity related to the methodologies, tenets and processes of Life Care Planning.

Since 1990, extensive research has been conducted on the impact of Case Management on a range of patient outcomes. Areas of study include Case Management's influence on patients' compliance with self-care, the linkage of compliance with clinical outcomes, research on the relationship between interventions, compliance and outcomes, the impact of Case Management on patient education and the impact of patient education on compliance and clinical outcomes. The overwhelming result of the research makes a strong and positive argument for continued use of Case Managers in patient assessment, planning and facilitation of treatment. The research supports the influence of case managers in Health Outcomes, Quality of Care and Cost of Care issues. This is what the case manager is involved in doing on a day to day basis in their work with patients and within the Health Care System. Attached to the amicus curiae brief is a list of over 599 references related to Case Management literature and research.

As a tool of the Case Management Process, Life Care Planning has enjoyed its own place in the literature and in research. It is important to keep in mind that Life Care Planning is a tool that requires specialized training and board certification/eligibility before it is properly applied. Attached is a list of 177 references specific to Life Care Planning. Although, as noted earlier, the task of conducting validation research on Life Care Plans is complex, significant strides have been made. A recent validation study was published in *The Case Manager* (McCollom, P. & Crane, R. (2001). Life care plans: Accuracy over time. *The Case Manager*, 12(3), 85-87). Patients with spinal cord injuries who had Life Care Plans completed between November 1995 and January 1998 were surveyed to update their current status. Sufficient data was collected to allow for a comparison of the original plan assessment of needs and recommendations to actual outcomes. The authors stated, "survey findings demonstrate a clear consistency between projected and actual needs." In addition, findings were consistent with other Case Management studies demonstrating the link between Case Management, planning, intervention, compliance and outcomes. For example, the authors found, "individuals who underwent comprehensive routine evaluations reported fewer complications than those who relied on physician care on an as needed basis." When the Case Manager trained in Life Care Planning developed preventative programming by setting up routine evaluations rather than relying on "as needed visits" in reaction to the onset of problems, a statistically significant reduction in complications was identified.

The Foundation for Life Care Planning Research in cooperation with the Department of Rehabilitation Counseling at the Medical College of Virginia, Virginia Commonwealth University and the Department of Rehabilitation at Georgia State

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University has brought together private practice professionals, University Academics, bench Scientists and Doctoral Students in a cooperative, long term effort to perform a myriad of research projects related to Life Care Planning, Case Management and closely related patient/disability issues. Four significant projects have been initiated.

The first project is a series of case studies designed to ascertain the key variables involved in reliability and validity research in Life Care Planning. Although Life Care Planning validation research has been undertaken, the complexities have, in the opinions of this group, been insufficiently outlined. The goal of this project is to establish the standards for validation research by which all such projects will be judged in the future.

The second project involves examining patients within two Life Care Planning/Case Management practices where the files have been open for a minimum of one year. It is common practice in all Case Management practices where Life Care Plans have been performed to update patient data and update the life care plans at least once each year, if circumstances allow. The goal of this project is to examine 80 to 100 patient files with one to four years between the initial Life Care Plan and the last re-evaluation and update. An analysis of the variance between selected primary factors from the first to the latest plan will provide a statistical indication of predictive validity. The study also will further our understanding of the standards that need to be established in such validation studies and the limitations of such studies.

The third study is a retrospective analysis of a single practitioner's caseload extending back to 1990. This will involve surveying 500 to 1000 patients, depending on the number of respondents, to update their current status. An analysis will then be performed to determine the accuracy of the Life Care Plan in relation to the needs identified and the recommendations made at that time. A variety of factors will have to be considered such as changes in technology that could not be considered in the earlier plan, lack of available funding to purchase items in the plan and development of complications that could not be predicted within a reasonable medical certainty, to name a few. Those are areas to be discussed in the data analysis but do not prevent an accurate and effective methodological design from being accomplished.

The fourth study is an analysis of inter-rater reliability. The design looks at the accuracy of the process when different Life Care Planners are provided the same case details and are asked to develop a Life Care Plan from the data provided. Trained raters will "score" the results and the data will be analyzed to provide a statistical determination of inter-rater reliability.

Finally it is important to reiterate, we are not testing theory. We are utilizing an effective and widely accepted tool of Case Management practice to establish a preventative plan of care for an individual who is catastrophically injured or chronically ill from onset through the end of life expectancy. It is a tool applied by Case Managers specifically trained in life care planning entering the field from a number of Rehabilitation and Health Related Professional backgrounds including Rehabilitation Counseling, Rehabilitation Nursing, Rehabilitation Psychology and Psychiatry. The basis for these recommendations exists in current research, practice guidelines and established standards within medicine, nursing, rehabilitation and the health related professions, each of which are touched on within the Life Care Plan recommendations. This tool is the only consistent methodological process in place in any profession designed to assist in the performance of this task. It was developed by

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Rehabilitation Professionals working within the Case Management field for direct application to long term patient management and support.

**2. The extent to which the technique relies upon the subjective interpretation of the expert.** - This test also goes to the subjective nature of the opinion.

Life Care Planning has become a valuable and necessary component of Case Management and Rehabilitation. Yet it remains a tool to be applied by trained and knowledgeable professionals. Exacting standards do exist for Life Care Planning in general and for the individual disabilities being evaluated and for which a plan is being developed. The concept is not unlike a procedure being chosen and applied by a physician. Standards exist for the evaluation and diagnosing of the patient, choosing the procedure, applying the procedure and following-up with the patient. Yet within those standards, the physician has the ability to exercise a range of professional judgments that take into consideration individual patient differences, variations in the specific nature of the disorder, and variations in how best to apply specific procedures to individual patient differences. This same need for Rehabilitation Experts/Case Managers to exercise professional judgement is a component of the Life Care Planning process. However, this must be done within the context of the standards noted and a careful balance between published, accepted standards and professional judgement must be maintained. Published standards are never an excuse for failing to exercise appropriate professional judgement yet, at the same time, one can not say that they chose to exercise professional judgment as a means to simply, and lightly, dismiss accepted standards.

**3. Whether the theory has been subjected to peer review and/or publication.** - Vigorous debate of ideas presented in a public forum is one of the most commonly accepted methods of evaluating an idea, whether in the laboratory or the courtroom.

In the spring of 2000, the Life Care Planning Summit was held in Dallas, Texas. This Summit drew leading professionals from across the United States as well as from all the representative fields within Life Care Planning. Additionally representatives from the boards of the International Association of Rehabilitation Professionals (IARP), the International Academy of Life Care Planners (IALCP), the Commission on Disability Examiner Certification (CDEC), the American Association of Legal Nurse Consultants (AALNC) and the Case Management Society of America (CMSA) were involved in its development as well as in attendance. Published proceedings from that summit identified 148 publications including peer reviewed journal articles and reference texts on Life Care Planning. The published proceedings also included several unanimously agreed upon procedures and standards for Life Care Planning. In a recent publication for the *American Board of Disability Analysts*, Paul M. Deutsch Ph.D., CRC, CCM, CLCP, established a list of 174 major references on Life Care Planning updated to 177 for attachment to this brief. This includes over 25,000 pages of reference textbooks plus peer reviewed journal articles published in the medical, nursing, rehabilitation psychology, rehabilitation counseling, and case management journals.

**4. The technique's potential rate of error.** - The inquiry here is simple. Is the technique reasonably reliable-or widely erratic?

The potential rate of error is based entirely on the individual knowledge, skill, care and attention applied by the professional completing the Life Care Plan. There is no inherent error rate within the process such as the standard error of measurement one might encounter in a psychometric test utilized in psychology. Each patient is individually evaluated and the life care plan reflects the person's unique needs. In addition, there are individual, professional differences of opinion that can and do exist. These are particularly apparent when one expert has the opportunity to evaluate a patient and includes specific goals and interests expressed by that person while the other professional bases opinions only on medical records and a general knowledge of the disability. Nevertheless, it is again necessary to stress that a Life Care Plan is not a "scientific theory" but rather a "tool" utilized by Case Managers emanating from a variety of health related professional backgrounds and applied to the long term care of individuals who are catastrophically injured or chronically ill.

**5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community.** - This inquiry is a variation of the "general acceptance" standard used by courts before *Daubert*. It is also a recognition by the courts that an idea or technique will be generally accepted by a cautious, skeptical, and critical scientific community only after it has demonstrated its truth over an adequate period of time in an adequate number of forums.

The Life Care Planning process first appeared in the professional literature in 1981. Since that time it has gained widespread acceptance. It is taught as part of the core curriculum in many of the Rehabilitation Counseling Programs in the University systems throughout the United States. There are currently 87 Universities in the United States offering graduate programs in Rehabilitation Counseling accredited by the Council of Rehabilitation Education. As of the filing of this brief forty-two of these programs have responded to a survey of their curriculums. The goal was to ascertain course content in case management and Life Care Planning. Included in these respondents were five Universities in Texas. Of the forty-two Universities who have responded thus far, 83% included case management courses in the core curriculum. Life Care Planning was included as a component in 54% of the University curriculums. Twenty-one percent of the faculty of the responding University programs had at least one Professor actively developing Life Care plans as part of their consulting work. Seven percent of the responding Universities maintained full Life Care Planning training curriculums.

Included in these respondents were five Universities in Texas. These five Universities were found to teach Case Management Courses and three of them included Life Care Planning in their curriculums. A breakdown of these universities include Stephen Austin University and University of Texas at Austin teaching Case Management while North Texas University, Pan American University as well as Texas Southwestern Medical College are teaching Case Management with a Life Care Planning component. Two of these Universities had faculty developing Life Care Plans in their consulting practices.

Life Care Planning is also recognized and endorsed by numerous professional organizations, which both sponsor continuing education programs in this area and

assign continuing education credits to groups that have appropriate credentials and provide training in Life Care Planning. The list of Professional Associations providing such endorsements and sponsorship include:

- The International Association of Rehabilitation Professionals
  - The International Academy of Life Care Planners
  - The Commission on Disability Examiner Certification
  - The American Association of Legal Nurse Consultants
  - The Case Management Society of America
- In addition, several groups offer post graduate or graduate training programs in Life Care Planning including:
- University of Florida/Intelicus
  - University of North Carolina
  - Georgia State University
  - Medical College of Virginia

Examples of other professional organizations which have granted continuing education credits for Life Care Planning coursework include but are not limited to the following:

- The Rehabilitation Psychology Division of the American Psychological Association
- The American Rehabilitation Counseling Association
- The National Rehabilitation Counseling Association

#### **6. The non-judicial uses which have been made of the theory or technique.**

- Although listed last, this is one of the most important considerations. A theory or technique created only to influence juries and win lawsuits will never get past the gatekeeper. That was the underlying problem that led to *Daubert* and every judge is acutely aware of the inadmissibility of such evidence.

Life Care Planning is fundamentally a case management tool. It is used in the health care field by Nurses, Rehabilitation Counselors, Rehabilitation Psychologists, Psychiatrists and other qualified Health Related Professionals acting as Board Certified or Board Eligible Case Managers specially trained in Life Care Planning to plan for and manage catastrophic disability and chronic illness from onset through life expectancy. Life Care Planning and Case Management finds its application in the following arenas:

- Health Insurance Referrals
  - Long Term Disability
  - Special Needs Trust
  - Worker's Compensation Casework
  - Geriatric Care
  - Inpatient Acute Rehabilitation Programs
  - Inpatient Post Acute Rehabilitation Facilities
  - Residential Post Acute Rehabilitation Facilities
  - Long Term Supervised Living Programs
  - Independent Living Programs
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Several nationally known programs such as the Shepherd Center, one of the nation's Regional Spinal Cord Injury Model System Centers, have established in house Life Care Planning programs. Life Care Planning training programs have been provided to the Emory Center for Rehabilitation Medicine, Harmorville Rehabilitation Center, The Rehabilitation Center of Pittsburgh, The Chicago Institute of Rehabilitation, the Children's Health Care of Atlanta (Scottish Rite), The Florida Institute of Neurological Rehabilitation and Timber Ridge Rehabilitation Center to name a few.

The Life Care Plan, as a tool, is effective and applicable across all catastrophic injuries and all severe, chronic illness which are disruptive of the patient and family's lives and require effective management and planning of both physical and mental health. The resulting benefit in rehabilitation as well as long term management has proven to be the reason that Life Care Planning has not only survived intense scrutiny from the health care, insurance and legal fields over the past 25 years but in fact has grown into a thriving and incredibly effective component of rehabilitation.

Thus, as is evident from the foregoing analysis-that life care planning can easily meet the reliability test if the sponsoring attorney and judge are given the appropriate information about the profession.

**B. The relevancy test.** - The second *du Pont* test is relevancy. The evidence in a trial must have relevance to the issues in the case that are to be decided by judge and jury.

All other evidence, no matter how interesting or amusing, is inadmissible; otherwise, trials would never end.

The *du Pont* case explained relevancy by saying "the proposed testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 556. If the evidence has no relationship to any of the issues in the case, it is irrelevant and does not satisfy Rule 702.

For a life care planner, relevancy usually is not a concern. You will be testifying about your recommendations, findings and conclusions concerning the litigant and your testimony is directly relevant to the nature and extent of the damages recoverable by the litigant. It is important, however, to discuss your testimony with the attorney and carefully tailor the testimony to the issues before the court. Your expert opinions must, of course, be based on your own honest judgment but the attorney must ask the questions that will demonstrate the relevancy of the opinions. If there is careful coordination with the attorney the life care planner can be a highly effective witness.

### III. Conclusion

Courts are cautious entities and do not quickly accept new ideas. Life care planning is a young profession and one that is unfamiliar to many judges. Thus, before the gatekeeper will allow you to testify, he or she must receive enough information to be convinced that your testimony satisfies *Daubert*, *du Pont*, and any local guidelines. The purpose of this article has been to outline the basic information you need to meet those tests.

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