STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 460-9-04 Wrcv

Scott Mann and the Estate of Nathan LaBrecque
Plaintiffs

v.

Adventure Quest, Inc., d/b/a the Academy at Adventure Quest,
and Peter Drutchal
Defendants

Decision on Motion to Exclude Expert Testimony

In the trial that is scheduled to begin next week, plaintiff Scott Mann has proposed to introduce expert testimony on the standard of care that he alleges was applicable to defendants Adventure Quest and Peter Drutchal at the time of his alleged abuse. To this end, plaintiff has produced an expert disclosure in which plaintiff represents that Laurie Gullion, a clinical assistant professor of outdoor studies at the University of New Hampshire, will testify that, at the relevant times, outdoor camp counselors owed certain duties of care with respect to their relationships with the student-athletes attending the camp, and that outdoor educational programs also owed certain duties of care with respect to the selection, training, and supervision of camp counselors. Plaintiff further plans to elicit an opinion from Professor Gullion that the abuse would likely have been prevented if the proper policies and procedures had been implemented and followed.

Defendant Adventure Quest and intervenor Virginia Surety Company have filed a motion to exclude this testimony under Vermont Rule of Evidence 702 and the principles established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Defendants (referred to as such for the sake of simplicity) argue that Professor Gullion's opinions are speculative, are not based on reliable data or information, and are not relevant to the time period in which the abuse began or occurred. Viewing the motion as raising a legitimate issue as to the reliability of the proposed testimony, the court set the motion for a preliminary hearing under Vermont Rule of Evidence 104(a).

Although the motion to exclude evidence was filed by the defendants, the general rule is that the proponent of expert testimony is the one who bears the burden of establishing that the prosed testimony is reliable. *985 Associates, Ltd. v. Daewoo Electronics America, Inc.*, 2008 VT 14, ¶ 13, 183 Vt. 208. Hence, as one treatise has explained, "if both parties sat mute" at the *Daubert* hearing, "the court would have to rule against the party with the burden of persuasion, namely, the proponent of the evidence." 1 Faigman & Blumenthal et al, Modern Scientific Evidence: The Law and Science of Expert Testimony § 1:9 (2012–2013 ed.).

That situation very nearly occurred here. At the *Daubert* hearing, the proponent of the expert testimony did not produce the expert to testify about her opinions so that the court could make a finding as to their reliability. Instead, plaintiff chose to rely upon the expert's deposition and expert disclosure, both of which disclose the expert's opinions in only the most general of terms. As a result, plaintiff has failed to establish the reliability of any opinions other than (or more specific than) those disclosed in the deposition and expert disclosure. 1 Modern Scientific Evidence, *supra*, at § 1:9.

On the merits of what *was* introduced into the record at the preliminary hearing, Professor Gullion has testified that she was asked to prepare an opinion about "standards in the outdoor programming field" at the relevant times that would have been applicable to the factual context of this case. By this, she meant that her task was to prepare an opinion about the duties of camp counselors and outdoor educational programs with respect to the detection and prevention of sexual abuse. As framed in terms of the evidentiary rules, therefore, one might say that her task was to serve as essentially a historian who has prepared a specialized opinion about the standard of care that was applicable at a given point in the past. See *Kumho Tire*, 526 U.S. at 141–42 (explaining that expert testimony in the nature of non-scientific but nevertheless specialized knowledge raises issues of methodology, objectivity and reliability).

Professor Gullion testified that she prepared her opinion by conducting research that consisted of searching for and reviewing available documentation that would have showed the ethical standards and operating procedures in the outdoor field at the time, and that she followed up on this research by contacting several other experts in the field and interviewing them about their work at the relevant time periods. From this research, she evidently reached a series of conclusions about the policies and procedures that would have been "standard" for outdoor educational programs and camp counselors at the time.

The specific nature of these conclusions remains undisclosed. In the expert disclosure, Professor Gullion's conclusions are described only in the most generalized terms imaginable, and the deposition did not include much greater detail despite inquiry from defendant's counsel. As a result, her opinions, as best as they can be determined from the scant record available, are as follows:

> * Adventure Quest owed a duty to provide a properly trained and supervised staff.
>
> * Adventure Quest owed a duty to provide training with regard to proper conduct by counselors around the students.
>
> * Adventure Quest owed a duty to develop a protocol for staff to report misconduct by another staff member to someone in authority other than the perpetrator.
>
> * Peter Drutchal owed a duty not to misuse relationships with students for his private advantage.

The record does not explain what Professor Gullion meant by proper training and supervision, what she meant by proper conduct (other than that sexual abuse falls outside the bounds of proper conduct), or what specific reporting protocols would have been standard.

Accepting, however, the generality of the opinions that have been disclosed, there is a reasonable basis in the record for concluding that these opinions, as framed above, are admissible at trial. In the context of non-scientific expert testimony, "the reliability of an expert's methodology will be determined by common sense, logic, and practices common to or accepted in the area of expertise in question." 29 Wright & Graham et al, Federal Practice and Procedure: Evidence § 6266. "Generally, expert opinions meet the reliability threshold when an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes practice in the relevant field." *Id.* Put another way, the role of the court in the context of non-scientific expert evidence is to "identify the nature of the particular problem that an expert is being asked to solve, and then to assess whether the available data supports a conclusion that the necessary expertise exists to offer a dependable opinion on that problem." 1 Modern Scientific Evidence, *supra*, at § 1:25.

Here, Professor Gullion was asked to conduct historical research aimed at identifying the standard of care that existed in her field at a particular moment in time. Her methodology was to conduct searches for existing literature and to follow up those searches with personal interviews of other experts in the field. It seems to the court that this was an entirely reasonable way of researching that particular question. It moreover seems to the court that the conclusions reached (roughly, that educational programs owe duties to train and supervise staff and to ensure that misconduct is reported to someone other than the perpetrator) are unsurprising, and supported not only by the research but also by common sense.

Defendants have focused upon the facts that the search queries did not yield "peer reviewed literature," and that Professor Gullion's work was done solely for the purpose of this litigation. But these objections speak more to the nature of the question presented than to any deficiencies in the methodologies employed by the researcher. And although her research was done for the purpose of this litigation, there is little in the record to suggest that her methodology would have been different if she were undertaking the inquiry for academic purposes.

Finally, there is nothing novel, complex, or hard to understand about the expert's opinions. It will be easy for the jury to understand the import of cross-examination calculated to reveal inadequacies in the methodologies employed or the conclusions reached. See 29 Federal Practice and Procedure, *supra*, at § 6262 (explaining that the admissibility standards imposed by *Daubert* are directed towards identifying expert testimony that is so confusing or misleading that cross-examination would be ineffective in drawing out the reliability problems inherent in the testimony). For these reasons, the court concludes that the expert's opinion with respect to the four above-identified standards of care rests upon "a sound factual and methodological basis," and are thus admissible at trial. *Estate of George v. Vermont League of Cities and Towns*, 2010 VT 1, ¶ 16, 187 Vt. 229 (quoting *Daewoo*, 2008 VT 14, ¶ 16). However, the expert will not be permitted to offer an opinion that is expressed in more specific terms than the four opinions identified above. The consequence of plaintiff's choice to rely upon the expert disclosure and

the expert's deposition is that plaintiff is limited to the level of generality expressed in those documents.

Professor Gullion has also proposed to testify as to an opinion that the abuse would likely have been prevented if appropriate reporting procedures had been in place at the time that plaintiff first reported inappropriate conduct to staff member Greg Nuckolls. As to this opinion, plaintiff has not presented any evidence to show that this expert is qualified to testify about the probabilities of human behavior, or that such testimony would rest upon a foundation other than speculation. As should have been apparent to the parties by the nature of the court's questioning at the preliminary hearing, the court will not permit this opinion to be introduced in the form of expert testimony, but (assuming that the proper foundational facts are established by the evidence) such a conclusion would be an appropriate area of argument by the attorneys during their closing remarks.

ORDER

For the foregoing reasons, Defendants' Motion to Exclude Testimony of Laurie Gullion (MPR #35), filed Mar. 14, 2013, is ***granted in part and denied in part*** as set forth herein.

Dated at Woodstock, Vermont this 5th day of April, 2013.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

APR - 8 2013

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