Expert Testimony: Expanding Its Role in Domestic Violence Civil Cases

The Jurist
December 2016

In This Issue

- Historical Approach: Expert Witnesses
- Experts Provide Context for Victim Behavior
- Domestic Violence Experts in PFA and Custody
- Finding Qualified, Cost-Effective Experts

There is no “typical” domestic violence victim or single pattern of behavior that can be observed in an abusive relationship. Abusive behaviors within a relationship are complex and often go unrecognized or unidentified in legal proceedings. [1] Despite a progressive transformation of the legal, community, and social service response to domestic violence, both the general public and professionals alike continue to express inaccurate and incomplete understandings of the relevant issues. [2]

Expert witnesses can be critical in both criminal and civil proceedings to ensure that the trier of fact makes informed decisions based on the circumstances in each case. This issue of the Jurist discusses approaches to the use of expert
Issue Highlight

In a legal setting, misconceptions regarding domestic violence present barriers for victims' access to justice. Domestic violence victims frequently act in ways that are mistaken as negative or blameworthy behaviors. Expert witnesses can be used effectively to provide context about the complexities of domestic violence for the courts and jurors in civil cases. However, expert testimony is typically reserved for use in criminal cases, particularly in sexual assault cases and matters involving self-defense after a victim kills an abusive partner. Although the Pennsylvania Rules of Evidence permit a more expansive approach for the use of domestic violence expert testimony in civil matters, such testimony is still rare. There is little Superior or Supreme Court guidance on the use of expert testimony in civil matters.

Historical Approach to Expert Testimony in Sexual Assault Cases

Between 2005 and 2014, nearly 150,000 American men and women per year were victims of rape or sexual assault. [3] Research suggests that 25 percent of women in relationships are sexually assaulted by their intimate partners. [4] Sexual assaults committed by an intimate partner are more likely than stranger or acquaintance assault to cause physical injury and are used to intimidate, control, and demean victims of domestic violence. [5]

Although expert testimony regarding victim behavior is used almost exclusively in criminal matters, particularly concerning victims of sexual assault, using expert witnesses in both criminal and civil cases involving domestic violence can yield benefits. Domestic violence victims often present behaviors that are similar to those displayed by victims of sexual assault. Therefore, we can look to the use of expert testimony in sexual assault cases as a guide for domestic violence cases. This section will explore the history and use of experts in sexual assault cases.

The use of expert testimony in sexual assault criminal cases evolved because of misunderstandings about victim behaviors, such as delayed reporting, that resulted in acquittals. [6] Sexual assault victims, if they report their assaults, typically delay reporting for a significant amount of time from when the assault
prosecuting sexual assault cases. Sexual assault victims also present the following responses to trauma that are commonly mistaken as suspicious behavior:

- Denying the assault initially and subsequently
- Displaying a lack of emotion following the sexual assault
- Recanting or providing inconsistent statements regarding the assault
- Failing to cooperate with law enforcement

read: Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?, Patricia L. Fanflik, American Prosecutors Research Institute (2007).

Experts Can Explain Seemingly Counterintuitive Victim Behavior

Jurors frequently link concerns about victim responses to the reliability of the victim’s testimony. To combat the seemingly counterintuitive nature of delayed reporting and victim behaviors, prosecutors sought the help of experts to inform jurors and provide context for their sexual assault cases. Expert testimony on common post-traumatic behaviors educates jurors on specific patterns of behavior, especially reasons why victims fail to report crimes, thus helping to eliminate many common myths associated with sexual assault cases.

Criminal matters involving sexual assaults encompass the bulk of case law surrounding expert testimony on victim behaviors. This case law is due in part to the enactment of 42 Pa.C.S. § 5920, designed to supplement the provisions in the rules of evidence governing expert witness testimony. The supplemental rule expressly permits expert testimony on specific types of victim responses and behaviors in sexual assault cases, eliminating many of the challenges this type of testimony had previously encountered. The Pennsylvania Superior Court noted the correlation of expert testimony and credibility, stating:

"Revealing the circumstances surrounding an incident of sexual abuse, and the reasons for the delay, enables the factfinder to more accurately assess the victim's credibility. Moreover, this Court has acknowledged that juries in sexual assault cases expect to hear certain kinds of evidence and, without any
Expansion of Expert Testimony in Civil Domestic Violence Cases

The broad scope of the Pennsylvania Rules of Evidence permits expert testimony on any relevant matter in civil cases. A perpetrator’s abusive behaviors often are not acknowledged or documented as domestic violence in civil matters. Research suggests that mediators and judges alike often do not comprehend all of the complexities of the manipulation, minimization, threats, and retaliation used by the abuser, or the impact it has on domestic violence victims and their families. In addition, misperceptions about victim behavior can lead to beliefs that victims are hysterical, exaggerating, or in less danger than they are. The use of an expert witness on domestic violence would help to explain ways that abuse can affect the way victims act.

More than one in three U.S. women and more than one in four U.S. men have experienced rape, physical violence and/or stalking by an intimate partner. Very often, one or more violent incidents are accompanied by an array of other types of abuse that are less easily identified, yet firmly establish a pattern of intimidation and control in the relationship.

Protection from Abuse Cases

Judges across Pennsylvania readily issue Protection from Abuse (PFA) orders to victims who suffer physical abuse. However, some judges deny PFA petitions where emotional abuse is accompanied by a physical component, such as the abuser kicking the victim’s vehicle or punching a wall near the victim. Some judges might consider these actions as harsh words and bad behaviors not subject to the PFA Act. Expert testimony can assist judges in PFA cases by providing context to an abuser’s intended coercive effect of emotional abuse when indirect physical components are present.

Emotional abuse, with or without a physical component, can place domestic violence victims in reasonable fear of bodily injury or serious bodily injury - included in the statutory provisions of the PFA Act. However, judges could mistakenly minimize the intended impact of emotional abuse in PFA
victim into compliance. In fact, psychological abuse has a more long-term effect on victims than physical abuse and is a stronger indicator of Post-Traumatic Stress Syndrome (PTSD) in women.[17]

Children who witness violence and coercive control by one parent toward the other experience at least the same level of serious effects as those who were direct targets of the abuse. The research also shows that each child’s experiences, perceptions, and responses are unique. Any intervention should be tailored to that child’s particular risk set and situation. Studies also support that children are at greater risk of being abused when one parent is abused by the other parent. Abuse of the children, or threatened abuse, is a powerful tool of control.[18]

Child Custody Cases
Although Pennsylvania statutes require judges to consider domestic violence by one parent against the other when awarding custody,[19] accusations of domestic violence can be met with skepticism and criticism of the victim parent. Often, testimony regarding domestic violence is not given appropriate weight without documented evidence like police reports, PFA orders, or other “proof” to show that abuse occurred. Judges also may not understand the risk to children in a household with domestic violence, especially when the violence has not openly been directed against the children. Expert testimony in custody cases can assist judges in making a determination of what is in the best interests of a child.

Expert witnesses can inform the court about:

- the reasons for a victim’s failure to report a crime due to fear of retaliation, minimization, or a feeling of guilt due to pressure by friends or family
- ways abusers use custody proceedings to further harass the victim parent
- the necessity of an award of sole custody or supervised visitation in cases where significant abuse is present, to eliminate further abuse against the victim parent
- why the relocation of a victim parent is necessary to bring about the cessation of abuse
previously occurred

Expert testimony in custody proceedings will enable judges to more accurately assess the underlying domestic violence issues relevant to a custody case and ensure that judicial rulings protect the health and safety of children and the victim parent.

Practical Considerations: Qualifications of Cost-Effective Experts

Abusers often control the family finances or prohibit the victim to work, leaving domestic violence victims among the most economically vulnerable populations. Although expert witnesses can be invaluable, many domestic violence victims cannot afford to hire attorneys in civil matters,[23] nor can they afford professional experts. There are creative solutions to find expert witnesses that comply with the Pennsylvania Rules of Evidence.

Rule 702 permits individuals to qualify as experts based on knowledge, skill, experience, training, or education.[24] In cases of domestic violence those experts can be:

- Domestic violence legal advocates
Executive directors of domestic violence centers

In Pennsylvania, witnesses are qualified as experts so long as the judge finds that the witness has any reasonable claim to specialized knowledge on the issue before the court. Such domestic violence experts can be as beneficial as general psychologists and medical experts, as long as the expert is not connected to the extant case in any way.

In many cases, the legal system is the last resort in a victim’s chance to escape the abuse. Judges’ willingness to accept individuals who qualify based on experience is fundamental to ensure that victims are protected from legal injustice that can occur as a result of misconceptions about domestic violence.

ENDNOTES


[13] *Id.*


[15] Superior courts have upheld cases where there was no physical injury but reasonable fear of imminent serious bodily injury based on the abuser’s threatening behavior, e.g., punching a wall in front of plaintiff (Fonner v. Fonner, 731 A.2d 160 (Pa. Super. 1999)), and “verbal chiding, intimidating demeanor (blocking [plaintiff’s] vehicular access), threat of retaliation, and striking of [plaintiff’s] vehicle to the point of damaging it,” (McCance v. McCance, 908 A.2d 905, 911 (Pa. Super. 2006)).


This project was supported by subgrant No. 26422 awarded by PCCD, to the Administrative Office of Pennsylvania Courts (AOPC) and from the AOPC to PCADV by means of a pass through agreement. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of PCCD, AOPC or the U.S. Department of Justice, Office on Violence Against Women.