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COMMENTS

THE HIGHWAY PATROL OFFICER AS EXPERT WITNESS

Jeffrey M. Tanzer

I. INTRODUCTION

The Montana Supreme Court has traditionally admitted expert opinion liberally. Although Article VII of the Montana Rules of Evidence¹ was designed to clarify admissibility standards and facilitate the presentation of opinion and expert testimony,² controversy over admissibility still frequently figures in appeals to the court. One major area of controversy has been expert testimony by police officers—typically highway patrol officers, and typically in the context of highway accident reconstruction. This comment will examine the status of the highway patrol officer as expert witness in accident reconstruction in Montana,³ focusing on problems that arise under the rules of evidence governing expert testimony.

II. HISTORICAL BACKGROUND

The history of the common law rule against opinion testimony in Montana is as noteworthy for its exceptions as for its restrictions. While there was a general rule that witnesses must state facts rather than opinions, the supreme court has long recognized that expert testimony is needed to assure correct judgments in cases involving complicated fact situations.⁴ Unlike many other jurisdictions,⁵ Montana has also long held that experts are excepted

1. MONT. R. EVID. 701-05. For a comprehensive discussion of the Montana Rules of Evidence, see Clarke, *Montana Rules of Evidence: A General Survey*, 39 MONT. L. REV. 79 (1978).

2. "The intent of Art. VII, M.R.Evid., *Opinions and Expert Testimony*, is to make persons possessed of specialized knowledge helpful in assisting the trier of fact to understand the evidence." *Wollaston v. Burlington Northern, Inc.*, ___ Mont. ___, 612 P.2d 1277, 1282 (1980).

3. While police officers have occasionally testified as experts in other contexts, virtually all Montana cases dealing with expert police testimony involve highway patrol officers and accident reconstruction. Rules governing expert testimony in this area apply equally to criminal and civil cases.

4. *Demarais v. Johnson*, 90 Mont. 366, 370, 3 P.2d 283, 285 (1931).

5. See Annot., 38 A.L.R.2d 13 (1954).

from the rule that witnesses may not give their conclusions as to ultimate facts in issue.⁶

In the 1952 case of *State v. Bosch*,⁷ the Montana Supreme Court recognized for the first time that a non-eyewitness may be qualified to give opinion testimony about a highway accident: "A highway patrolman with many years of experience in handling an automobile, investigating wrecks and accidents, with the benefit of schooling and study courses dealing with skid marks and related matters is as much an expert in his line as any other specialized person in his respective field."⁸ The officer, who examined skid marks left by a car that ran off a road, was permitted to give an opinion that the car was traveling at least seventy-two miles an hour. Since *Bosch*, Montana highway patrol officers have been permitted to give expert opinions about experiments recreating accidents,⁹ point of impact,¹⁰ identity of driver,¹¹ cause of accident,¹² and adequacy of highway signs.¹³

III. AREAS OF CONTROVERSY

A. Qualifications

One of the two Rule 702 prerequisites for admissibility of expert testimony is that the witness be "qualified as an expert by knowledge, skill, experience, training, or education."¹⁴ Because Rule 702 by its own terms offers a variety of ways for a witness to qualify as an expert, controversy in this area tends to focus on specific applications where an expert's "expertise" may be suspect. In other words, even though the highway patrol officer is recognized as an expert in the field of accident reconstruction, questions may arise about his qualifications to offer an opinion about a particular technical aspect of a given accident.

In the 1982 case of *Goodnough v. State*,¹⁵ the plaintiff alleged negligence in maintaining dangerous highway conditions. The state offered evidence to show that the driver who crashed into the

6. *Wibaux Realty Co. v. Northern Pacific Ry. Co.*, 101 Mont. 126, 54 P.2d 1175 (1935); *Kelly v. John R. Daily Co.*, 56 Mont. 63, 181 P. 326 (1919).

7. 125 Mont. 566, 242 P.2d 477 (1952). The court also admitted testimony by an automobile mechanic who had inspected the skid marks.

8. *Id.* at 571-72, 242 P.2d at 480.

9. *Hurley v. Star Transfer Co.*, 141 Mont. 176, 376 P.2d 504 (1962).

10. *State v. Stoddard*, 147 Mont. 402, 412 P.2d 827 (1966).

11. *State v. Deshner*, 158 Mont. 188, 489 P.2d 1290 (1971).

12. *Pachek v. Norton Concrete Co.*, 160 Mont. 16, 499 P.2d 766 (1972).

13. *Workman v. McIntyre Constr. Co.*, ___ Mont. ___, 617 P.2d 1281 (1980).

14. MONT. R. EVID. 702.

15. ___ Mont. ___, 647 P.2d 364 (1982).

plaintiff from behind was the superseding cause of the accident. One issue raised on appeal was the competence of a highway patrol officer to testify about the speed of the following vehicle. The plaintiff claimed that while an officer is generally competent to give an opinion as to speed based on skid marks, "estimating speed in a complicated collision requires training in physics and mechanics which highway patrolmen do not have."¹⁶

The Montana Supreme Court affirmed admission of the officer's testimony. From *Goodnough*, the Montana rule appears to be that experience in investigating accidents and general training in "how to estimate speed from the length of skid marks and damage to automobiles"¹⁷ qualify a highway patrol officer to give opinion testimony based on observed damage to automobiles. No special showing of training in physics or mechanics is required. The supreme court relied on the general rules that determination of an expert witness' qualifications lies within the trial judge's discretion and that so long as the cross-examiner has a chance to probe the basis of an expert's opinion, the question is one of weight not admissibility.¹⁸

Sometimes a generous policy of admissibility can lead to dubious results. In *Mets v. Granrud*,¹⁹ a 1980 case, the trial court permitted a highway patrol officer to testify that the cause of a one-vehicle accident was a broken "pitman arm" (a steering mechanism part).²⁰ The appellants contended that the officer was unqualified to give his opinion about a mechanical malfunction. Without responding to the gist of the appellants' contention, the supreme court upheld the lower court's discretion. In a vigorous dissent, Justice Shea argued that the officer was not qualified to give that opinion and that the trial court should not have relied on it in granting summary judgment to the defendant.²¹ Justice Shea

16. *Id.* at ____, 647 P.2d at 368. Knowledge of physics and mechanics is necessary because when cars collide at a relatively great speed various factors such as momentum, inertia, angle of impact, slope of road, design and weight of vehicles, and friction influence the resulting damage. While speed may be roughly inferred from the amount and kind of vehicle damage, these other factors need to be taken into account for a more accurate estimate of speed. Skid marks alone cannot provide a basis for estimating speed in a complicated collision because the collision absorbs much of the momentum of the vehicle. Skid marks are more reliable when they truly indicate stopping distance, such as when a vehicle comes to an abrupt stop without meeting any resistance or meeting relatively little resistance.

17. *Id.* at ____, 647 P.2d at 369.

18. *Id.*

19. ____, Mont. ____, 606 P.2d 1384 (1980).

20. The testimony was contained in the officer's deposition, which the trial court considered in granting summary judgment to the defendant.

21. *Mets*, ____, Mont. ____, 606 P.2d at 1388 (Shea, J., dissenting). The dispositive

pointed out that the witness, while generally competent to investigate accidents, had no expertise in metallurgy or mechanics that would qualify him to testify that a broken pitman arm caused this particular accident.

One problem in attempting to define the requisite qualifications for expert testimony in accident reconstruction is that the published opinions rarely discuss such qualifications in detail. Only one jury verdict has been overturned by the Montana Supreme Court because a highway patrol officer's testimony was improperly admitted,²² and the reason in that case appeared to be lack of evidence rather than lack of qualifications. Although the rules were not meant to view experts in a narrow sense,²³ in the questionable case it is important to consider Justice Shea's concern in his *Mets* dissent: "Discretion of a trial court in permitting expert testimony is no substitute for careful consideration of the underlying qualifications of a witness to advance his opinion on a subject requiring expert opinion."²⁴

B. *Proper Situations for Expert Testimony*

Rule 702 permits expert testimony by qualified experts "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."²⁵ *State v. Deshner*,²⁶ a 1971 case, provides the most complete statement on this aspect of admissibility. Both occupants of a car were thrown out when the car drove off a road. Based on measurements made at the scene of the accident, an officer gave an opinion that the defendant was the driver. In upholding admission of the opinion, the court said:

The basic rule on the admissibility of expert opinion is whether the subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness, or whether the matter is sufficiently beyond common ex-

issue on appeal was whether the *res ipsa loquitur* doctrine applied to the facts of the case. Plaintiff's expert, a metallurgist, testified that the pitman arm broke when the car collided with a pole, and not before impact. In *Tompkins v. Northwestern Union Trust Co.*, ___ Mont. ___, 645 P.2d 402 (1982), the court overruled *Mets* to the extent that it permitted disposition as a matter of law where conflicting evidence existed.

22. *O'Brien v. Great Northern Ry. Co.*, 145 Mont. 13, 400 P.2d 634 (1965). In *Workman v. McIntyre Constr. Co.*, ___ Mont. ___, 617 P.2d 1281 (1980), a verdict was overturned on the basis that a highway patrol officer's expert testimony about adequacy of highway signs was improperly excluded.

23. FED. R. EVID. 702 advisory committee note.

24. *Mets*, ___ Mont. ___, 606 P.2d at 1389 (Shea, J., dissenting).

25. MONT. R. EVID. 702.

26. 158 Mont. 188, 489 P.2d 1290 (1971).

perience that the opinion of an expert would assist the trier of fact.²⁷

This standard of admissibility for expert opinion is easily met in most accident reconstruction cases because of the complex evidence and the inferences to be derived from it. In other instances, however, it is difficult to understand why the subject of the expert's testimony is considered beyond the common experience of the jury. In *Pachek v. Norton Concrete Co.*,²⁸ a 1972 case, the court for the first time upheld admission of an investigating highway patrol officer's opinion as to the cause of an accident. The accident occurred when defendant's truck, turning onto a highway from a gravel road without stopping, collided with the plaintiff's car, which was traveling along the highway at a reasonable speed. The officer, who arrived at the scene one-half hour after the accident, testified on the basis of his observations and statements made by the parties and other eyewitnesses that a right-of-way violation caused the accident.

What makes admission of this opinion difficult to justify is that both parties testified at the trial. The defendant driver, in fact, testified that he was looking into his mirror rather than down the highway when he pulled out and that he did not stop. The officer's testimony, based largely on witness interviews, did not add to the parties' testimony, and the jury did not need expert testimony to determine the cause of the accident.

Rude v. Neal,²⁹ a 1974 case, similarly involved a highway patrol officer's opinion as to the cause of an accident well within non-expert comprehension. The collision occurred when the defendant turned left and struck the plaintiff, who was approaching on the two-lane highway from the opposite direction. The investigating officer testified that speed was not a factor in the accident and, further, that in his opinion the defendant's failure to yield right-of-way was the cause. The jury could easily have reached the latter conclusion on its own. While determination of speed is clearly a proper subject for expert opinion testimony, can the same be said for determination of cause when neither party was speeding and the parties were available to testify?

The answer seems to be that the admissibility standard means what it says. A jury may be capable of understanding and recognizing right-of-way violations without the help of specialized knowl-

27. *Id.* at 193, 489 P.2d at 1293 (quoting *State v. Campbell*, 146 Mont. 251, 258, 405 P.2d 978, 983 (1965)).

28. 160 Mont. 16, 499 P.2d 766 (1972).

29. 165 Mont. 520, 530 P.2d 428 (1974).

edge. Yet it is difficult to contend that an officer, who has investigated hundreds of accidents and who inspected the scene of the accident in question, has nothing to add to assist the jury on the causation issue. Moreover, Rule 702 encourages the use of specialized understanding to insure that the trier of fact arrives at the correct conclusion.³⁰ The fact that the jury is free to disregard the expert's opinion³¹ serves to mitigate the possibility of prejudice.

This survey of the law, however, must be considered in light of the holding in *Ployhar v. Board of Trustees*,³² a 1980 case. The plaintiffs sought damages for the death of their son, who was killed when a tractor ran over him during a class in heavy equipment operation. A supervising instructor, when asked during cross-examination for his opinion as to the cause of the accident, testified that the decedent was at fault. After a verdict for the defendant, the trial court granted a new trial on the basis that expert opinion testimony had been improperly admitted.

The Montana Supreme Court found no abuse of discretion by the trial judge in excluding the expert opinion testimony. The court reasoned that the accident was simple enough to be within the understanding of the jury. In reaching its conclusion, however, the court described the expert testimony as "not necessary."³³ Asking whether testimony is "necessary" is quite different from asking whether testimony "will assist the trier of fact." Further, as Justice Harrison rightly recognized in his dissent, the case does involve technical questions of a complexity comparable to those in other Montana cases where expert opinion was admitted.³⁴

It is tempting to view *Ployhar* as an aberration. First, the case has not been cited in more recent cases. Second, the appeal involved the granting of a new trial rather than a verdict. Third, the holding on admissibility is out of line with the court's other decisions. The fact remains, though, that the court has indicated its willingness to exclude expert opinions on the cause of an accident on the basis that the jury should be able to reach an independent

30. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952), quoted in FED. R. EVID. 702 advisory committee note.

31. *Rose v. Rose*, ___ Mont. ___, 651 P.2d 1018, 1020 (1982); *McGuire v. Nelson*, 167 Mont. 188, 200, 536 P.2d 768, 775 (1975).

32. ___ Mont. ___, 609 P.2d 1226 (1980).

33. *Id.* at ___, 609 P.2d at 1228.

34. *Id.* at ___, 609 P.2d at 1228-30 (Harrison, J., dissenting).

conclusion.

C. *Bases of Opinion and Disclosure of Underlying Facts*

Rules 703 and 705 are designed to facilitate admission of expert opinion testimony by widening the bases for such testimony and removing from the party offering it the burden of disclosing all the data upon which it is based. Under Rule 703, an expert may base his opinion on one or more of three sources: personal perception, facts disclosed to him at trial, and facts "of a type reasonably relied upon by experts in a particular field," whether or not independently admissible in evidence.³⁵ Under Rule 705, an expert need not disclose facts underlying an opinion unless so ordered by the court, although he may be required to disclose underlying facts on cross-examination.³⁶ While these rules save time and increase the use of expert assistance, one problem that arises in this area is *reliability* of expert opinion testimony.

Rule 703 clearly permits an expert to base his opinion on hearsay evidence in some circumstances. A doctor, for example, may give an opinion based on hospital records, X rays, and nurses' reports³⁷—hearsay sources that are probably independently admissible—and may also base an opinion on inadmissible hearsay such as a police report.³⁸ The rationale for this rule is that the "expert is fully capable of judging for himself what is or is not a reliable basis for his opinion."³⁹

This reasoning is generally sound, but when a highway patrol officer is the expert the possibility of unreliable testimony appears greater for two reasons. First, the Montana cases have not indicated the extent to which the officer's opinion may lawfully be based on interviews with possibly biased parties and eyewitnesses. Second, because under Rule 705 facts or data underlying the expert opinion will not necessarily be disclosed, the court and jury may not have a chance to consider unreliable bases of testimony.

Montana cases have not distinguished between physical evidence and interviews with eyewitnesses as sources of information.⁴⁰

35. MONT. R. EVID. 703.

36. MONT. R. EVID. 705.

37. See FED. R. EVID. 703 advisory committee note.

38. See *Azure v. City of Billings*, ___ Mont. ___, 596 P.2d 460 (1979).

39. *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975), *quoted in Azure*, ___ Mont. ___, 596 P.2d at 472.

40. The commission comments to Rule 703 seem to regard this tendency as implicit authority for admitting testimony based on hearsay: "it is apparent that highway patrolmen are allowed to reconstruct and give the cause of an accident based upon their investigation and interviews of persons involved in the accident." MONT. R. EVID. 703 commission

While no Montana case has admitted expert accident reconstruction testimony based solely on witness interviews, such interviews may have strongly influenced the testimony that has been admitted. The extent to which this kind of influence should be permitted is difficult to measure. Witnesses can obviously be of great help to an officer investigating an accident scene. Because the patrol officer is an expert, it does seem unlikely that he will give an opinion based on at-the-scene statements uncorroborated by physical evidence. Whether the expert's appraisal successfully weeds out self-serving statements, however, is a question that might not be answered by the litigation process because hearsay sources will not be fully disclosed in some cases.

If a rule can be inferred from the case law, it is that witness statements are a valid source of information where there is also substantial physical evidence. This "rule" avoids the danger of unsubstantiated hearsay recognized in the Advisory Committee's Note to federal rule 703, which explicitly warned against accident reconstruction based on eyewitness testimony.⁴¹

Rule 705 appears on its face likely to make opinion testimony less reliable because it allows a witness to testify without disclosing underlying facts. This procedure was designed to serve the rule's primary purpose: elimination of time-consuming hypothetical questions.⁴² The rule provides compensating assurances of reliability since the court and the cross-examiner can compel disclosure of the underlying facts.⁴³ If such a disclosure is made and the evidence is insufficient to support the conclusions, then the court ought to be able to reject the testimony as a matter of law.⁴⁴

Whether a Montana court will do so, however, is doubtful under the interpretation of Rule 705 in *Wollaston v. Burlington*

comments.

41. If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

FED. R. EVID. 703 advisory committee note.

42. MONT. R. EVID. 705 commission comments. Prior to the rule's adoption, hypothetical questions were not an indispensable prerequisite to expert opinion testimony in Montana, although witnesses were required to testify as to facts upon which their opinions were based. *State v. Hallam*, 175 Mont. 492, 575 P.2d 55 (1978).

43. Under MONT. R. Civ. P. 26(b)(4), a party can discover through interrogatories the facts on which an expert expected to testify at trial will base his opinion. This procedure helps the party to prepare to challenge any insufficient bases of testimony.

44. This is essentially what happened in *O'Brien v. Great Northern Ry. Co.*, 145 Mont. 13, 400 P.2d 634 (1965), a pre-rules case. See *supra* text accompanying note 22.

Northern, Inc.,⁴⁵ a 1980 case. After settlement with the railroad, the plaintiff's action for damages from an automobile-train collision proceeded against Sanders County for negligence in maintaining a grade crossing. The county's case depended mainly on the investigating highway patrol officer's testimony that the accident occurred because of the plaintiff's failure to yield right-of-way. On appeal, the plaintiff contended that the opinion as to cause should not have been admitted because the officer had lost the notes he made at the time of his investigation.

In ruling the testimony admissible, the supreme court stated that under Rule 705 the officer's "opinion was admissible, *irrespective of what underlying facts or data may have buttressed his opinion.*"⁴⁶ Here, the fact that the notes were lost was harmless because the jury was made aware of the loss and the expert based his opinion in part on photographs and documents examined during trial. The rule arising from the case, however, indicates that it is the *jury's* task—not the court's—to determine whether there is sufficient evidence to support an opinion: "As long as the cross-examiner is given adequate opportunity to bring forth for the jury's consideration the weaknesses of any assumptions or facts underlying the opinion, the weight to be given the expert's testimony even on the ultimate issue, is now for the jury to determine."⁴⁷

Thus while the *qualification* of an expert lies within the trial court's discretion, the sufficiency of the *basis* for his opinion is a matter of weight for the jury to decide.⁴⁸ Logically, since the trial court generally has wide discretion in admitting or excluding evidence, one would assume that the court retains some legal discretion to exclude for insufficient basis. Under *Wollaston*, however, the court does not appear to have this power.

D. Cause of Accident

Rule 704 states that otherwise admissible opinion testimony "is not objectionable because it embraces an ultimate issue to be

45. ___ Mont. ___, 612 P.2d 1277 (1980).

46. *Id.* at ___, 612 P.2d at 1282 (emphasis added).

47. *Id.*

48. Carried to its extreme conclusion, this position could lead to dubious results, since a qualified expert could conceivably give an opinion without any reliable factual basis whatsoever. This is what may have happened in *Mets*, according to the dissent in that case. *Mets* is even more questionable in that the case was disposed of on a summary judgment motion, so that the suspect testimony was not subject to full cross-examination. See *supra* notes 19-21 and accompanying text.

decided by the trier of fact."⁴⁹ Montana has long permitted expert witnesses to give opinions as to the cause of an accident. Still, objections are often made to opinions on cause. As long as the expert is found properly qualified and the subject a proper one for expert testimony, the objections are consistently rejected.

It may be helpful to consider the experience of this rule in another state, not so much to recommend the result as to explore the problems the rule obscures. In 1978, despite case law and a statutory directive to the contrary,⁵⁰ the Kansas Supreme Court held in *Lollis v. Superior Sales Co.*⁵¹ that an expert witness in an automobile negligence case, "whether an investigating police officer or another expert, may not state his opinion as to what actions of the parties, if any, contributed to the collision or as to who was at fault in causing the collision."⁵²

The result was determined by the court's recognition of a danger that opinions on cause or contributing factors by their very nature weigh disputed evidence and invade the province of the jury. The investigating officer in *Lollis* testified at trial that the plaintiff's excessive speed had contributed to his accident. The plaintiff, however, had been knocked unconscious by the accident and was unable to give his version of the facts to the officer, who depended on the defendant's self-serving statements. If the officer had heard the plaintiff's equally plausible story, he could easily have arrived at a completely different opinion as to which driver's negligence contributed to the collision. In Montana, the conflicting testimony would be considered a question of weight for the jury to resolve. The Kansas court, emphasizing that further evidence may turn up after an investigation and that a patrol officer's testimony may overly impress a jury, excluded the testimony altogether.

The foregoing discussion is not intended to suggest that Montana should adopt such a rule.⁵³ The Kansas experience is instructive, though, in showing how admission of opinion testimony under

49. MONT. R. EVID. 704.

50. The Kansas statute reads in pertinent part: "Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact." KAN. STAT. ANN. § 60-456(d) (1965).

51. 224 Kan. 251, 580 P.2d 423 (1978). A discussion of the series of Kansas cases culminating in *Lollis* can be found in Note, *Opinion and Demonstrative Evidence: Automobile Accident Reconstruction*, 14 WASHBURN L.J. 264 (1975). *Lollis* was noted in *Evidence: Police Experts and Ultimate Issue Testimony*, 18 WASHBURN L.J. 659 (1979).

52. *Lollis*, 224 Kan. at 263, 580 P.2d at 431.

53. Kansas appears to be unique among the states in taking the position, after adopting evidentiary rules permitting opinion testimony on ultimate issues of fact, that experts may not testify as to causes or contributing factors of a highway accident.

the rules of evidence can result in prejudice to a party. The offending testimony in *Lollis* would likely be received in Montana because it came from a qualified expert who was assisting the trier of fact (Rule 702) and was based on physical evidence and a witness interview (Rule 703); nor would it be excluded because it embraced an ultimate issue (Rule 704) or lacked a proper foundation (Rule 705). Montana's long tradition of admitting opinions on cause and other ultimate issues would prevent the final result in *Lollis*, which excepted accident reconstruction from the general rule that experts can offer opinions that embrace ultimate issues.

Kansas adopted its position as a form of insurance against receiving unreliable testimony otherwise admissible under its evidentiary rules. While that response is extreme, it is important to note how reliance on discretion of the trial court and the jury's ability to weigh evidence can lead to admission of an unreliable and actually misleading "expert opinion" about the cause of an accident.

IV. CONCLUSION

The Montana Rules of Evidence, while designed to enhance trial integrity by eliminating time-consuming procedures and encouraging expert assistance, can produce unreliable results in their application. Expert testimony by highway patrol officers is generally of great benefit to juries in litigation involving accident reconstruction. The possibility that juries will be unduly influenced by testimony of questionable reliability, however, is unnecessarily strong. The Montana Supreme Court can mitigate this problem by establishing more uniform and explicit standards governing such questions as expert qualifications, proper subjects for expert testimony, and evidentiary foundations. This will help to insure that the highway patrol officer is most useful where he is best qualified: as an investigator skilled in interpreting the physical evidence of a highway accident.

