

## The Question of Who?

By Scott M. Gordon

The storyline of any good mystery starts with the 5 W's – Who, What, When, Where and Why. They are the questions that drive the case and lead to a solution. But of these five investigative questions, one of them serves two roles. The question of Who? This basic query certainly is central to the ultimate resolution of the case. Leading us many times to the mild-mannered butler. But more important is *who* is leading and guiding us on the path of this mystery, leading us to the ultimate answer.

The courts have recently dealt with several different aspects of the how, what and why of expert testimony. In the recent case of *Richard v. Union Pacific Railroad Company* (2024) 2024 WL 4562561 (Richard), the court looked at the Who.

In *Richard*, the Plaintiff was working as a brakeman at a Union Pacific railyard in the City of Industry. Before the advent of modern train braking systems, the brakeman had the dangerous task of walking along the top of rail cars, manually operating the brakes as the train slowed and stopped. Today, the brakeman works in a variety of tasks, with one of the most important being the coupling and uncoupling of rail cars. The Plaintiff was assigned to route an incoming train from one of the tracks to the railyard. The incoming train was more than 7,000 feet long and had more than 105 cars. The Plaintiff disconnected the rear locomotive from the train, climbed aboard the rear railcar and directed the engineer to pull the train car lengths. As the train pulled forward, he fell from the railcar and sustained a severe compound fracture to his ankle.

The primary issue of causation in the case was whether the train



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inappropriately surged forward due to the engineer's negligence, or as Union Pacific contended, the Plain-

During trial, the Plaintiff sought to call an expert to testify on several topics including safe railroad and

**In *Richard v. Union Pacific Railroad*, the court ruled that a retired railroad engineer with 42 years of experience could qualify as an expert, despite lacking formal training in accident reconstruction. The case highlights that experience, not just formal education, is key in determining expert testimony admissibility.**

tiff was inappropriately positioned when the train began to move causing him to fall.

locomotive engineer operating practices. The expert was a retired Union Pacific engineer who had

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42 years of experience operating trains, including on the track involved in the case. The expert was to testify that between the time the engineer released the brakes and engaged the throttle of the train excessive “slack action” was created, which caused the rear railcar to suddenly snap forward, causing the injury.

The Railroad argued that this testimony should be excluded pursuant to Evidence Code §§ 801 and 802 because the proposed expert did not have any specialized education in accident reconstruction or biomechanics, had never qualified as an expert witness, and had no formal training in interpreting locomotive event recorders. The Plaintiff argued that experience in a trade, occupation or craft could qualify a witness as an expert, and further that this experience gave the witness the requisite special knowledge and skill to qualify as an expert.

The trial court conducted a hearing pursuant to Evidence Code § 402. The trial court excluded the witness’ testimony ruling that the witness “has no training or experience. He doesn’t have any qualifications that the expert witnesses that are going to testify in this case have.”

In discussing the issue presented, the court noted there are two statutes that specifically deal with the issues presented in the case: Evidence Code §720 which provides that: a person is qualified to testify as an expert if they have special knowledge, skill, experience, training, or education sufficient to qualify them as an expert on the subject to which

his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. Further, a witness’ special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Evidence Code § 801 provides that: if a witness is testifying as an expert, their testimony in the form of an opinion is limited to such an opinion as is: related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and based on matter (including their special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to them at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for their opinion.

The *Richard* court noted that in evaluating an expert’s qualifications, that experience is relative to the subject and is not subject to rigid classification according to rigid classification according to formal education or certification. An expert’s qualification can be established by showing the expert has the knowledge, was familiar with, or was involved in a sufficient number of transactions involving the subject matter of the expert’s opin-

ion. (citing: *ABM Industries Over-time Cases* (2017) 19 Cal.App.5th 277, 294 and *Malmquist v. City of Folsom* (2024) 101 Cal.App.5th 1186, 1200).

In *Richard*, the proffered expert had 42 years of experience as a railroad engineer, which included many years of experience operating the same kind of train involved in the case on the same track where the incident occurred.

In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*), the Supreme Court charged trial courts with acting as a gatekeeper to exclude speculative irrelevant expert opinion. (*Sargon*, at p.770). *Sargon* said that the trial court’s gatekeeping duty was to exclude expert testimony that is based on a matter of a type on which an expert may not reasonably rely, based on reasons unsupported by material on which the expert relies, or is speculative (*Sargon* at pp. 771-772). However, the Supreme Court made it clear that the trial court was not to pick between competing experts and must be cautious in excluding expert testimony. (*Sargon* p. 772).

The fact that different sides in litigation choose to present different kinds of expert testimony in support of their case, goes to the weight as opposed to admissibility of the evidence. In this case, the Plaintiff’s expert had substantial expertise in the operation of trains, including 42 years as an engineer. Much of that experience was gained in the same kind of trains on the same track involved in the case.

The Defendant argued that the Plaintiff’s expert did not have ex-

perience downloading and analyzing data from the event recorder and that he was not an expert in accident reconstruction. In rejecting these arguments, the court held that the expert’s lack of experience in *some* topics does not mean he is not competent to testify about *other* topics. The court found that the exclusion of the Plaintiff’s expert was prejudicial.

In many cases, the question of “Who?” the court allows to testify as an expert comes down to weighing different types of experience and training. *Richard* makes it clear that experience can be the basis of expertise. In his book *Ideas and Opinions*, Albert Einstein said, “Pure logical thinking cannot yield us any knowledge of the empirical world; all knowledge of reality starts from experience and ends in it.”

*Sargon* warns that trial courts must be cautious in excluding expert testimony. (*Sargon* at p. 772). Qualification can be gained through education, training and *experience*. The common expression “experience is the best teacher” traces its origins back to the writing of Julius Ceasar.

In weighing the admissibility of expert testimony, a trial court must not let the weight of the testimony bar its admissibility, unless the testimony runs afoul of the guidance provided by *Sargon*. The admissibility of expert testimony always involves answering the question—Who? The answer to this inquiry means weighing the qualifications of an expert witness. In that process, experience must be considered and given due consideration.