

**THE STATE OF NEW HAMPSHIRE**  
**Merrimack County Superior Court**  
163 N. Main Street  
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Concord, NH 03301 2880  
603 225-5501

**RECEIVED**  
AUG 09 2005

**NOTICE OF DECISION**

GARY M BURT ESQ  
WIGGIN & NOURIE  
PO BOX 808  
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01-C-0567 Patricia Baxter m/a/n/f v Charles & Kelly Temple

Enclosed please find a copy of the Court's Order dated 8/08/2005  
relative to:

**Order-Motion in Limine**

08/08/2005

William McGraw  
Clerk of Court

cc: Christopher J. Seufert, Esq.  
Neil T. Leifer, Esq.  
Andrew S. Wainwright, Esq.  
Honorable Philip S. Hollman

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Shelby Baxter, a minor, by her mother and next friend, Patricia Baxter

v.

Charles Temple and Kelly Temple

No. 01-C-0567

**ORDER ON DEFENDANTS' FOURTH MOTION IN LIMINE**

This civil action arises out of a landlord tenant relationship between tenant Shelby Baxter ("plaintiff") and landlords Charles Temple and Kelly Temple ("defendants") in which the plaintiff and her parents rented an apartment from the defendants. The plaintiff maintains she suffers from elevated blood lead levels resulting from exposure to lead paint in the apartment her family rented from the defendants. In this suit, the plaintiff alleges that the defendants breached their duty to maintain a habitable apartment for her and were negligent because of their failure to warn her of lead paint in the apartment.

This order addresses the defendants' motion in limine to exclude the testimony of plaintiff's expert witness, Dr. Barbara Bruno-Golden, on the grounds that Dr. Bruno-Golden's proposed testimony is not reliable under RSA 516:29-a. The court held a six day hearing on this motion, after which the parties submitted post-hearing memoranda.<sup>1</sup> For the reasons provided below, the defendant's motion is **GRANTED**.

**I. FACTUAL BACKGROUND AND RELATED TESTIMONY**

The plaintiff and her parents rented an apartment from the defendants at 8 Abbott Street in Concord, New Hampshire from May 1, 1995 to May 11, 1996. On September 9,

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<sup>1</sup> The plaintiff submitted a post-hearing memorandum and then a reply memorandum to the defendants' post-hearing memorandum. The court is only considering each party's post-hearing memorandum, not the plaintiff's reply memorandum, since it is only the post-hearing memoranda, that the court allowed.

1995, the plaintiff was tested for lead poisoning which showed that she had an elevated blood lead level of 36 micrograms per deciliter. As a result, the plaintiff filed this action on December 12, 2001.

After filing this action, the plaintiff's parents hired Dr. Barbara Bruno-Golden, a clinical neuropsychologist, to perform a forensic neuropsychological analysis on the plaintiff to determine whether she was suffering brain damage as a result of being exposed to lead. Dr. Bruno-Golden has an undergraduate degree in mathematics, a master's degree in special education, and a doctorate in humanistic and behavioral studies. She completed a study in the field of neuropsychology at the Boston Neurobehavioral Institute from 1986 to 1989. On cross-examination, Dr. Bruno-Golden stated that the Boston Neurobehavioral Institute was accredited with the American Psychological Association ("APA"). However, after some probing questions, she reconsidered and stated that she did not know if the Boston Neurobehavioral Institute was in fact accredited. Dr. Bruno-Golden also stated that she was not board-certified in neuropsychology.

Dr. Bruno-Golden conducted two broad-based neuropsychological testing batteries on the plaintiff, one in 2002 and the other in 2004.<sup>2</sup> The 2002 battery consisted of approximately twenty six different tests, several of which were augmented by sub-tests. See Defs' Ex. H. According to Dr. Bruno-Golden, the 2004 battery was substantially the same as the 2002 battery. The 2004 battery consisted of approximately twenty three different tests, several of which were augmented by sub-tests. Dr. Bruno-Golden testified that with regard to her conclusions, the critical tests administered in 2002

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<sup>2</sup> The term battery refers to a combination of several individual neuropsychological tests. See Defs' Daubert Hearing Mem. at 1.

were: (1) the Wechsler Intelligence Scale for Children III ("WISC III"); (2) the Rey Osterrieth Complex Figure Test ("Rey O"); and (3) the Connor's Continuous Performance Test ("CCPT"). See Pl's Ex. 1. As she further testified, the critical tests Dr. Bruno-Golden administered in 2004, were: (1) the Wechsler Intelligence Scale for Children IV ("WISC IV"); (2) the WISC III Process Instrument Digit Span Backward Test; (3) the Wide Range Achievement Test Third Ed. Reading Decoding Subtest ("WRAT-3"); (4) the Rey O; (5) the Children's Memory Scale; and (6) the CCPT. See Pl's Ex. 2.

Dr. Sandra Shaheen<sup>3</sup> testified as an expert witness for the plaintiff. In describing the methodology employed by Dr. Bruno-Golden in 2002 and 2004, Dr. Shaheen related that among the tests administered in evaluating the plaintiff, Dr. Bruno-Golden used certain ones commonly relied upon neuropsychologists who evaluate lead poisoning in children. Dr. Bruno-Golden testified that in assessing the plaintiff, she combined her quantitative analysis of the plaintiff's test scores with her qualitative analysis of the plaintiff's overall performance. After the 2004 evaluation, Dr. Bruno-Golden made the following summary and recommendations:

The overall test results reveal this child to be of average intellectual ability. This is judged to be a decline in her overall intellectual ability from her previous assessment in 2002. Her neuropsychological evaluation was otherwise significant for impairments in the areas of visual dysgraphia and kinetic apraxia, and persistent problems with attention/executive skills, associated with memory and retrieval problems with both verbal and nonverbal lengthy and more complex information. Academic testing was generally at grade level expectation, although it was noteworthy that the patient did not make any progress in reading decoding skills since her last assessment and is at risk for developing written language arts skills

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<sup>3</sup> Dr. Sandra Shaheen has been a practicing neuropsychologist affiliated with Children's Hospital in Boston, MA since 1984. She is affiliated with the Department of Psychiatry at Harvard Medical School where she teaches clinical neuropsychology and general assessment. She has also published literature on childhood lead poisoning.

problems. Her neurobehavioral presentation is consistent with her known history of plumbism, Class III, necessitating iron supplement therapy.

It is this examiner's opinion that Shelby continues to be at risk for developing language based learning problems, particularly in light of her overall general intellectual decline since her 2002 assessment, as indicated in her current WISC-IV scores with respect to the 2002 WISC-III scores.

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Dr. Bruno-Golden's Report at 10, Attached as Ex. A to Mem. of Law in Supp. of Defs' Fourth Mot. in Limine.

According to Dr. Bruno-Golden, one of the more notable differences between the plaintiff's 2002 and 2004 test scores was her twenty point drop in IQ as shown in comparing her WISC III score in 2002 and her WISC IV score in 2004. In 2002, the plaintiff had a full scale score of 122 on the WISC III, whereas in 2004, she had a full scale score of 102 on the WISC IV.

## **II. THE BOSTON PROCESS APPROACH**

Dr. Bruno-Golden testified that she employed a neuropsychological testing technique called the Boston Process Approach. Dr. Bruno-Golden related that she was trained in using this technique at the Boston Neurobehavioral Institute, and that under it the clinician chooses which tests are most relevant in the assessment of the child. She referred to the Boston Process Approach as "hypothesis testing."

Dr. Bruno-Golden explained that in hypothesis testing of a patient, she begins by administering an intelligence test and then chooses subsequent tests based upon the patient's performance. She further explained that it is important to test the hypotheses in a clinical setting in order to reach a diagnosis necessary for treatment.

Dr. Shaheen testified that the Boston Process Approach is a flexible battery approach in which the clinician utilizes a collection of standardized neuropsychological tests to assess various brain functions. Like Dr. Bruno-Golden, Dr. Shaheen referred to the Boston Process Approach as hypothesis testing in which the clinician selects tests either to rule in or to rule out the hypothesis initially created.

In addition to the description of the Boston Process Approach by Dr. Shaheen and Dr. Bruno-Golden, the plaintiff submitted the following textbook description:

Although the Boston Process Approach uses a core set of tests for most patients, it cannot be characterized as a "battery approach" because the technique can be used to assess the pattern of preserved and impaired functions despite the particular tests used. In addition to the core tests, several "satellite tests" are used to clarify particular problem areas and to confirm the clinical hypotheses developed from early observations of the patient. The satellite tests may consist of standardized tests or a set of tasks specifically designed for each patient. The only limits to the procedures that are employed (beyond the patient's tolerance and limitations) are the examiner's knowledge of available tests of cognitive function and his ingenuity in creating new measures for particular deficit areas.

Pl's Ex. 5. "The Boston Process Approach to Neuropsychological Assessment", Milberg, Hebben, Kaplan at 67. According to the authors of "The Boston Process Approach to Neuropsychological Assessment", the Boston Process Approach methodology is "based on a desire to understand the qualitative nature of the behavior assessed by the clinical psychometric instruments, a desire to reconcile descriptive richness with reliability and quantitative evidence of validity, and a desire to relate the behavior assessed to the conceptual framework of experimental neurology." *Id.* at 65.

### III. DISCUSSION

The defendants argue that Dr. Bruno-Golden should not be allowed to testify as an expert because her proposed testimony is not reliable under RSA 516:29-a.

Specifically, defendants contend that Dr. Bruno-Golden's testimony is inadmissible because the methodology she employed in conducting the neuropsychological tests upon the plaintiff and in determining that the plaintiff is at risk for developing language based learning problems has not been tested, has not been subject to peer review and publication, has no known or potential rate of error, and is not generally accepted in the appropriate scientific literature. Further, the defendants contend "the methodology that Dr. Bruno-Golden employed when testing the plaintiff deviated so drastically from standardized methodology that measuring her results against standardized norms would be inappropriate, if not impossible." Defs' Daubert Hearing Mem. at 5. Additionally, the defendants maintain that "Dr. Bruno-Golden's reliance on qualitative data and clinical experience, instead of scientific quantitative data, lead her to interpret the plaintiff's performance subjectively, consequently yielding a conclusion that is unique to her, unverifiable and unreliable." Id.

The plaintiff counters that Dr. Bruno-Golden's general methodology in testing Shelby Baxter is admissible because it is "reliable, relevant, and satisfies the applicable standards set forth in the United States Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and it's [sic] progeny, and as codified by New Hampshire statute, RSA 516:29-a." Pl's Post-Hearing Brief in Opposition to Defs' Daubert Mot. to Exclude the Testimony of Barbara Bruno-Golden, Ed. D. at 1.

#### **A. Standard of Review**

New Hampshire Rule of Evidence 702 provides:

[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, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

N.H. R. Ev. 702. "The proper focus for the trial court is the reliability of the expert's methodology or technique." Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 148 N.H. 609, 616 (2002). "The trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." Id. (citing Daubert, 509 U.S. at 592-95). "Thus, the trial court must 'decide whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.'" Id. (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156 (1999) (quotation omitted)).

In Baker Valley Lumber, Inc., the New Hampshire Supreme Court adopted and applied the Daubert standard to New Hampshire Rule of Evidence 702 analysis to determine the admissibility of expert testimony. The New Hampshire Legislature codified the Daubert standard in RSA 516:29-a, II, which provides:

II (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

- (1) Have been or can be tested;
- (2) Have been subjected to peer review and publication;
- (3) Have a known or potential rate of error; and
- (4) Are generally accepted in the appropriate scientific literature.

(b) In making its findings, the court may consider other factors specific to the proffered testimony.

"Importantly, the Daubert test does not stand for the proposition that scientific knowledge must be absolute or irrefutable." State v. Dahood, 148 N.H. 723, 726 (2002).

"If it is of aid to a judge or jury, its deficiencies or weaknesses are a matter of defense, which affect the weight of the evidence but do not determine its admissibility." Id. (citation omitted). "Thus, provided the proffered scientific evidence rests on sound

scientific reasoning or methodology and properly can be applied to the facts in issue, it meets the requirements of Rule 702, even if the conclusion is novel or controversial.” *Id.* (citation omitted). Furthermore, “[b]ecause the Daubert analysis is flexible and tied to the facts of a given case, a methodology may be reliable even if it fails to meet one or more of these factors.” Baker Valley Lumber, 148 N.H. at 616. “Likewise, in an appropriate case the trial court may fashion additional factors to determine the reliability of the testimony.” *Id.* In no case, however, may such factors be based upon the credibility or weight the court attributes to the expert’s conclusions.” *Id.*

**B. RSA 516:29-a, II, Daubert Analysis**

**i. Whether Dr. Bruno-Golden’s Methodology in Conducting Neuropsychological Tests Upon the Plaintiff Can Be or Has Been Tested**

Dr. Bruno-Golden, Dr. Sandra Shaheen, and Dr. David Faust<sup>4</sup> testified that Dr. Bruno-Golden’s methodology for evaluating the plaintiff has not been tested. As noted above, in administering the 2002 and the 2004 neuropsychological tests on the plaintiff, Dr. Bruno-Golden employed the Boston Process Approach. Under this approach, Dr. Bruno-Golden selected a number of neuropsychological tests to evaluate the plaintiff, some of which were critical to her evaluation.

Dr. Bruno-Golden testified that each of the critical tests she utilized in conducting her evaluation of the plaintiff has been tested. However, as the defendants argue, whether certain tests have individually been tested is irrelevant. What matters is whether

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<sup>4</sup> Dr. David Faust is a full professor at the University of Rhode Island. He is a board certified clinical psychologist with a specialty in neuropsychology. Dr. Faust has many professional achievements, awards and publications. He has lectured before the APA on issues related to methodology and has also served on the APA advisory board that helped draft the APA’s professional standards.

the combination of the tests selected, in other words, the battery constituting Dr. Bruno-Golden's methodology, has been tested.

Dr. Bruno-Golden was unable to identify any test that has assessed the reliability of the combination of tests she used in evaluating the plaintiff. In fact, Dr. Bruno-Golden testified that the Boston Process Approach she employs as a technique or method in conducting a forensic examination, has never been tested and cannot be tested because it varies from practitioner to practitioner. Moreover, Dr. Bruno Golden testified she could not recall if she has ever administered the same test battery she used with the plaintiff upon any of the thousands of other patients she has evaluated. Therefore, the Court finds that the methodology Dr. Bruno-Golden used with the plaintiff cannot be and has not been tested.

ii. **Whether Dr. Bruno-Golden's Methodology in Conducting Neuropsychological Tests Upon the Plaintiff Has Been Subject to Peer Review and Publication**

The plaintiff failed to provide any evidence that the particular methodology Dr. Bruno-Golden employed in this case has been subject to peer review and publication. Nevertheless, Dr. Shaheen testified that in the scientific literature, there is widespread acceptance of the Boston Process Approach which in a general sense is the methodology used by Dr. Bruno-Golden. See Defs' Ex. A; Kolb and Wishaw (1990); Fein and Farah (1997); Sermund-Clikeman (2001); Lezak, 3<sup>rd</sup> ed. (1995); Berstein (2000, in Yeates, et al., eds), and Baron (2000, in Yeates, et al., eds). However, Dr. Shaheen further testified that Dr. Bruno-Golden's specific methodology under the Boston Process Approach has not been subject to peer review or described in published articles. See May 5, 2005 Tr. Transcript at 87, attached to P1's Bench Tr. Mem.

Dr. Bruno-Golden referred to an article entitled "The Boston Process Approach to Neuropsychological Assessment" by Milberg, Hebben, Kaplan, *supra*, as a published item in support of her specific methodology. However, as Dr. Faust testified, this article is not a peer review article but rather a position paper, because there are no studies demonstrating the accuracy of the overall methods discussed. As Dr. Faust also explained, absent such studies, the position advocated in the article is meaningless because an untested hypothesis is nothing more than an educated guess.

Dr. Bruno-Golden testified that, given the Boston Process Approach, it is likely the specific methodology she employed in this case has never been used by any other clinician, including herself. It therefore follows that the battery Dr. Bruno-Golden created to assess the plaintiff's neurological condition has not been subject to peer review and publication.

Notably, a significant characteristic of the Boston Process Approach differentiating it from the fixed battery approach is that the Boston Process Approach "tests the limits" and procedurally modifies time limits in administering sub-tests. See "The Boston Process Approach to Neuropsychological Assessment" at 69. Dr. Bruno-Golden testified that on certain tests she disregarded the instruction manual as to the time limit for administering the tests. Neither Dr. Bruno-Golden nor Dr. Shaheen could identify any literature assessing the effect upon the reliability of "testing the limits" or modifying the procedural time limits as done by Dr. Bruno-Golden.<sup>5</sup>

iii. **Whether There is a Known or Potential Error Rate as to Dr. Bruno-Golden's Methodology**

<sup>5</sup> The court further discusses below Dr. Bruno-Golden's methodology as it involved her deviating from instructions in administering certain tests to the plaintiff.

The plaintiff provided no evidence showing that the methodology Dr. Bruno-Golden employed has a known or potential error rate. As the defendants argue, the combination of neuropsychological tests Dr. Bruno-Golden administered upon the plaintiff is not reliable because, “[w]hile there may be a known error rate for each individual test given, there are no studies evaluating the error rate for the combination of tests.” Defs’ Daubert Hearing Mem. at 13. As the defendants further argue, “[f]ocusing on just the individual tests, without considering the battery as a whole, will yield misleading results.” Id.

Dr. Faust testified that because Dr. Bruno-Golden’s methodology has not been tested as a whole, it does not have a false positive rate. See Tr. Transcript at 53-54, 74, June 23, 2005, attached to Defs’ Bench Tr. Mem. Dr. Faust stated that “in combining aspects of the Boston Process Approach and then aspects of things she had been taught in supervision . . . [her methodology is] kind of an idiosyncratic combination, if not hodgepodge of multiple influences combined in her own unique way.” Id. at 70. Dr. Faust further testified that if there is no research on the combination of tests or the battery created to evaluate a particular patient, the clinician is “engaged in a guessing game.” Id. at 73. He went on to state that “[i]f there’s no evidence on the combination, go ahead and do it perhaps in a clinical context but what you need to say is that I’m guessing.” Id. As Dr. Faust concluded, Dr. Bruno-Golden’s “overall procedure . . . [is] not scientifically validated . . . [and is] primarily ultimately founded on guesswork, speculation and conjecture, which sometimes flies directly in the face of scientific literature.” Id. at 75.

According to Dr. Faust, “experience and clinical experience, is a terrific way of generating hypotheses or possibilities, but the process of science involves testing those

hypotheses and seeing if they hold up under scrutiny. And so clinical experience is a terrific way of thinking about test items . . . [but] [i]t tends to be a lousy way of testing them.” See Tr. Transcript at 34, June 23, 2005, attached to Defs’ Bench Tr. Mem.

Also, according to Dr. Faust, when one conducts a forensic analysis, it is important to use norms. Norms represent standards for what is normal on a test, and allow the neuropsychologist to compare his or her patient with like others. In other words, one is unable to interpret raw scores on neuropsychological tests without comparing those raw scores to like others. Dr. Faust explained that in comparing patients to like others, it is important to follow a routine set of procedures because if the test is not given under the same set of procedures, then the comparison to like others is not accurate. Even if the neuropsychologist only varies the test slightly, different outcomes can result. Given Dr. Faust’s convincing testimony and the plaintiff’s failure to provide any evidence to the contrary, the court finds that the methodology that Dr. Bruno-Golden employed does not have a known or potential rate of error.

iv. **Whether there is General Acceptance in the Appropriate Scientific Literature for the Methodology Dr. Bruno-Golden Employed in this Case**

The plaintiff failed to show that the methodology Dr. Bruno-Golden employed is generally accepted in the appropriate scientific literature. Dr. Shaheen testified that the Boston Process Approach is “currently well accepted in the profession, is accepted as a training model for post-doctoral training required to become a neuropsychologist, is the standard set forth in the 1998 Houston Conference of the APA on Specialty Education and Training, and is accepted by insurance companies who pay for testing.” Pl’s Post-Hearing Brief in Opposition to Defs’ Daubert Mot. to Exclude the Testimony of Barbara

Bruno-Golden, Ed. D. at 9. Moreover, Dr. Shaheen testified that “[s]urveys within the field of neuropsychology confirm that the flexible battery approach is by far the most popular methodology used by clinicians.” *Id.* Dr. Bruno-Golden cited the Neuropsychological Assessment, 4<sup>th</sup> ed., a text book by Lezak, Howieson & Loring which describes her methodology, to support the general acceptance of her methodology in the scientific literature of neuropsychologists. *See id.*

According to the defendants, however, Dr. Bruno-Golden’s methodology is not accepted in the appropriate scientific literature as a “forensic” approach to assessing children with lead poisoning. As Dr. Faust stated, the goal of a clinical neuropsychologist like Dr. Bruno-Golden is to advance the interest of the patient. In order to achieve this goal, the clinical neuropsychologist may have to experiment and form hypotheses as to the patient’s condition. On the other hand, the role of the forensic neuropsychologist is to render an objective analysis even though such analysis may not advance the individual interest of the patient.

Although the plaintiff has shown that Dr. Bruno-Golden’s methodology is generally accepted in the appropriate scientific literature in the making of a clinical assessment, the plaintiff has not shown that Dr. Bruno-Golden’s methodology is generally accepted in the appropriate scientific literature in the making of a forensic assessment. In other words, the plaintiff has not shown that the methodology Dr. Bruno-Golden employed is generally accepted in the appropriate scientific literature as reliable in a legal proceeding.

v. **Additional Factor: Whether Dr. Bruno-Golden’s Methodology is Reliable as Administered in this Case**

Dr. Bruno-Golden agreed with the defendants' assertion that it is important to follow instructions for test administration in order to maintain the validity and reliability of testing. Defs' Ex. A1 at 178-179. She also agreed with the defendants' assertion that when you deviate from the standards of administration, you obtain a qualitative result, as opposed to a statistical result. Id.

Dr. Bruno-Golden testified that she allowed the plaintiff additional time to complete certain questions on the block design sub-test of the WISC IV in 2004. See Tr. Transcript at 143 (June 3, 2005), attached to Defs's Bench Tr. Mem. as Ex. A2. Specifically, Dr. Bruno-Golden permitted the plaintiff additional time on three questions. See id. In addition to the standard time allotted, she permitted an additional two minutes and 9 seconds on one question, one minute and 9 seconds on another question and 52 seconds on a third question. See id.

Dr. Bruno-Golden explained that she allowed the plaintiff additional time because the plaintiff wanted to continue and because she wanted to maintain a positive rapport with the plaintiff throughout. Dr. Bruno-Golden also explained that though she permitted the plaintiff additional time on certain questions, the plaintiff completed the Block-Design test as a whole within the prescribed time limit. Neither Dr. Bruno-Golden nor Dr. Shaheen could identify what effect allowing a patient to exceed the prescribed time limit of a sub-test would have upon the patient's performance on subsequent tests.

Standard 11.19 of the APA standards for educational and psychological testing under the title "The Responsibilities of Test Users" provides that "[w]hen a test user contemplates an approved change in test format, mode of administration, instructions, or the language used on administering the test, the user should have a sound rationale for

concluding that validity, reliability, and appropriateness of norms will not be compromised." Pl's Ex. 7 at 2. The comment to Standard 11.19 provides:

[i]n some instances, minor changes in format or mode of administration may be reasonably expected, without evidence, to have little or no effect on validity, reliability, and appropriateness of norms. In other instances, however, changes in format or administrative procedures can be assumed a priori to have significant effects. When a given modification becomes widespread, consideration should be given to validation and norming under the modified conditions.

Id. Here, the plaintiff has not shown that Dr. Bruno-Golden's decision to provide her with additional time to complete the test was an approved change in test format, or more importantly, what effect the changes that Dr. Bruno-Golden made in test administration had upon the validity, reliability and appropriateness of norms.

The defendants point to additional tests in which Dr. Bruno-Golden created her own rules of administration or procedure. Dr. Bruno-Golden only administered certain sub-tests within the NEPSY as opposed to administering the entire NEPSY battery as recommended in the manual. Similarly, she only administered portions of the WRAML and did not record the time limits she used, with the result that she could not say whether or not she had adhered to the time limits in the WRAML manual. Moreover, the defendants maintain that in giving the Rey O, Complex Figure Test, which required the plaintiff to draw a complex figure and then do it again after a thirty minute delay, Dr. Bruno-Golden administered inappropriate tests following the first half of the test.<sup>6</sup> The

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<sup>6</sup> The Rey O manual requires that the practitioner administer only verbal tests during that thirty minute delay period. Dr. Bruno-Golden testified that she administered the Cookie Theft test which required the plaintiff to create a story from a picture and the CCPT, which required the plaintiff to view a computer screen and respond accordingly. The defendants assert that the Cookie Theft Test and the CCPT went beyond verbal tests, such that the administration of those tests potentially corrupted the results of the Rey O Complex Figure Test.

defendants also contend that Dr. Bruno-Golden failed to follow the instructions with regard to the finger oscillation test and grip strength test.

Dr. Bruno-Golden could only identify two tests in 2002 and two tests in 2004 in which she followed the rules of administration. In 2002, she followed the rules of administration for the Peabody Picture Vocabulary Test and the California Verbal Learning Test-Children's Version. In 2004, she followed the rules of administration for the Peabody Picture Vocabulary Test and the Hooper Visual Organization Test.

Finally, Dr. Faust testified that when a clinician alters the administration of a test, error is almost always created. Dr. Faust explained that if a test is known to have an eighty percent accuracy rate if performed according to the rules of administration, then altering or not adhering to the rules of administration eliminates that known accuracy rate. In sum, based upon the evidence presented, the court finds that as administered in this case, Dr. Bruno-Golden's methodology was not reliable.

### **III. CONCLUSION**

The court concludes that Dr. Bruno-Golden's expert opinions must be excluded under RSA 516:29-a, II. The evidence overwhelmingly shows that the methodology she employed in what was supposed to be a forensic analysis of the plaintiff's neuropsychological condition was not reliable.


The methodology that Dr. Bruno-Golden employed in this case cannot be and has not been tested. Although various tests that Dr. Bruno-Golden used have been subject to peer review and publication, the evidence failed to show that the batteries she used have been subject to peer review and publication. Moreover, it is particularly troubling that there is no known error rate for the methodology that Dr. Bruno-Golden employed.

Further, while the Boston Process Approach as used by Dr. Bruno-Golden is generally accepted in the appropriate scientific literature as a sound clinical approach to evaluating individuals for brain injury, the evidence failed to show that it is generally accepted in the appropriate scientific literature as a forensic approach to evaluating individuals for brain injury. Finally, Dr. Bruno-Golden's methodology as administered in this case was not reliable.

Accordingly, the Court **GRANTS** the defendants' Motion in Limine to exclude the proffered testimony of Dr. Bruno-Golden.

So Ordered.

Dated: August 8, 2005

  
Philip S. Hollman,  
Presiding Justice