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Reconsidering the Medical Expert Witness System

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RECONSIDERING THE MEDICAL EXPERT WITNESS SYSTEM

by

YUNWEI JIANG

(Under the Direction of Thomas A. Eaton)

ABSTRACT

The expert witness is indispensable in a medical malpractice case. However, there are three main defects in the currently existing expert witness system. One is incompetence of expert

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by

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CHAPTER ONE INTRODUCTION

People are always more easily convinced by a judgment made on the ground of truth than of legal presumption, which determines that our judgment should be not only “fair”, but also “true”. The concept of “truth” constitutes an important foundation of the judicial system. Hence, many rules have been elaborately structured to find the truth, to speak the truth, and to safeguard the truth.¹ The expert witness helps jurors and judges to reach the truth in cases centered on technique.² Because of jurors’ lack of relevant knowledge, expert witnesses play a great role in modern litigation.³

The origin of the medical expert witness dates the 1840 treason-insanity trial of Edward Oxford.⁴ Expert witnesses were physicians whose education, background, and experience qualified them to explain to the jury the complexities of the care and the treatment that the plaintiff received and clarify why it did or did not meet, exceed, or fall below the required standard of care. Nowadays expert witnesses play a central part in medical malpractice cases.⁵

1 One example is that during the first step in the judicial process, jury selection, we question the jury panel in the voir dire (literally to speak the truth). See Fred L. Cohen, *The Expert Medical Witness in Legal Perspective*, 25 *J. Legal Med.* 185,189(2004).

2 See Douglas R. Richmond, *Regulating Expert Testimony*, 62 *Mo. L. Rev.* 485,486(1997).

3 *Id.* At 488.

4 See Frank R. Freemon, *The Origin of the Medical Expert Witness*, 22 *J. Legal Med.* 349 (2001).

5 See Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 *U. Ill. L. Rev.* 43, 44 (1986).

Medical malpractice is a specific type of negligence, in which physicians are accused of professional failure in their care of individual patients.⁶ In medical malpractice the standard to determine whether there was a breach of duty cannot be based on the average reasonable person standard, but on the knowledge, training and skill (or ability and competence) of an ordinary member of the profession in good standing.⁷ Establishing the connection between the defendant's improper diagnosing and treatment and resulted damage also involves complex medical knowledge. It is obviously beyond the ordinary and common knowledge of the lay jurors to establish the standard of care and causation. This makes the expert witness not only important, but practically indispensable in a medical malpractice case.⁸ Generally experts are required to prove the breach of the standard of care and causation in medical malpractice cases.⁹

Although the expert witness system is so important in medical malpractice cases, its enforcement is not satisfactory. Actually there has been an increasing criticism on expert witnesses among judicial opinions over the past ten years.¹⁰ It has been said that some courts suspect the competence of expert witnesses and blame them for the introduction of "junk science" into

6 See Fred L. Cohen, The Expert Medical Witness in Legal Perspective, 25 J. Legal Med. 185,185(2004).

7 See Prosser, Wade & Schwartz, Torts: Cases and Materials. Foundation Press, 11th ed, at 170.

8 See generally H. H. Henry, Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon, 81 A.L.R.2D 597, 598 (1962).

9 See Thomas J. Hurney, Jr. Rob J. Aliff, Medical Professional Liability in West Virginia, 105 W. Va. L. Rev. 369, 372(2003).

10 See Jeffrey L. Harrison, Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses, 18 Yale J. on Reg. 253, 253 (2001).

evidence;¹¹ some jurors doubt the honesty of expert witnesses. A 1992 poll conducted by the National Law Journal and Lexis found that over thirty percent of jurors polled in civil cases reported that the experts were biased.¹² Some scholars have used an economic analysis of the expert witness system to point out the enormous social costs.¹³ Sometimes experts are described as mercenaries, prostitutes, or hired guns, or as witnesses whose opinions are sold to the highest bidder.¹⁴ On the other hand, expert witnesses are “fearful of being ostracized, losing patient referrals, and being socially and professionally shunned” if their testimony is rejected.¹⁵ A great institutional and professional pressure can be powerful disincentives against testifying as an expert witness.

It has been pointed out that a perfect marriage between science and law is impossible.¹⁶ Law and science operate with different mechanisms. Their language and methodology are completely different. As far as understanding of truth, scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.¹⁷ Law operates with a more

11 See Douglas R. Richmond, *Regulating Expert Testimony*, 62 *Mo. L. Rev.* 485, 487(1997).

12 See Gary N. McAbee, *Improper Expert Medical Testimony: Existing and Proposed Mechanisms of Oversight*, 19 *J. Legal Med.* 257, 258-59. As to social costs, they can be divided into two categories: form-related or substance-related. Form-related means the costs associated with finding the best actor to tell the client's story. Substance-related, means the costs associated with biased, misleading, and inaccurate expert testimony.

13 See Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 *Yale J. on Reg.* 253, 255 (2001).

14 See Lesile R. Masterson, *witness immunity or malpractice liability for professionals hired as experts?* 17 *Rev. Litig.* 393, 393(1998).

15 See Fred L. Cohen, *The Expert Medical Witness in Legal Perspective*, 25 *J. Legal Med.* 185, 190(2004).

16 “The fundamental differences between legal and other technical fields, in terms of language, methodology, understanding of truth, and assumptions of risk, suggest that a perfect marriage between science and law is impossible. See David J. Damiani, *Proposals for reform in the evaluation of expert testimony in pharmaceutical mass tort cases*, 13 *Alb. L.J. Sci. & Tech.* 517,530(2003). *Id.*

17 Mark S. Brodin, *Behavioral Science Evidence In The Age Of Daubert: Reflections Of A Skeptic*, 73 *U.Cin.L.Rev.*867(2005).

pragmatic set of limitations. Law must decide the specific dispute between the parties based on the best information available, while science pursues an exact standard and can live with uncertainty. Because of these differences, it is hard for the legal community and the medical community to communicate with each other. However, this article aims to seek a balance between interests of the legal community and the medical community. Focusing on the main concerns presented in the previous paragraph, this article examines currently existing rules and offers some proposals in the following three areas: defining expertise, regulating professional negligence of expert witnesses, controlling dishonesty.

Chapter Two defines expertise and attempts to give a guarantee of the competence of expert witnesses. The first question is who can be a qualified expert medical witness. Federal Rule of Evidence 702 lays out general requirements for expert witnesses in all fields.¹⁸ Some states establish their own specific standards in medical malpractice.¹⁹ I would like to accept such a suggestion: If a well-informed reasonable person who suffered from the medical condition involved in the case would seek advice from the proffered expert physician regarding his condition, the expert is qualified.²⁰ The second question is what expert testimony can be admitted. Even if the evidence provider were a Nobel Prize Winner, he cannot replace jurors and judges to decide the case. It is the judge who has the final authority to decide what law controls the case. The jury decides the factual

18 Federal Rules of Evidence 702 states: If 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. See Fed. R. Evid. 702 (1975) (revised 2000).

19 See Thomas J. Hurney, Jr. Rob J. Aliff, Medical Professional Liability in West Virginia, 105 W. Va. L. Rev. 369,370(2003).

20 See David E. Bernstein Improving the qualifications of experts in medical malpractice cases, 1 Law, Probability & Risk 9,16(2002).

issues. However, it is hard for lay jurors to evaluate expert testimony. Some standards can be followed. The Frye general acceptance test and the Daubert two-part test, which one is better? This part covers these topics.

Chapter Three aims to clarify some popular misunderstandings about professional negligence as it relates to expert witnesses. One opinion is that expert medical witness testimony does not constitute the practice of medicine, so the expert is not liable to his client for professional negligence.²¹ Another is that witness immunity exempts expert witnesses from any civil liability.²² Exempting expert witnesses from professional liability will encourage junk science to be introduced into the court. This part analyzes the arguments in favor of imposing professional liability on expert witnesses.

Chapter Four is related to controlling dishonesty of expert witnesses. This problem can be traced to a conflict of interests. As experts paid by litigants, expert witnesses serve as litigants' advocate; as witnesses, their duty to the court requires them to safeguard the integrity of judicial system. How to counterbalance these two different interests? This part suggests some measures to control the bias of expert witnesses. These measures are: establishing judicial fine; establishing professional regulation; hiring expert witnesses by the court instead of litigants.

21 See Fred L. Cohen, The Expert Medical Witness in Legal Perspective, 25 J. Legal Med. 185,190(2004).

22 See Lesile R. Masterson, witness immunity or malpractice liability for professionals hired as experts? 17 Rev. Litig. 393,393(1998).

Chapter Five is a concise conclusion. It is mainly a summary of the proposals presented in the previous parts.

Before the detailed discussion, I must point out that this article focuses on expert witnesses in the field of medical malpractice, but not limited to medical expert witnesses. The expert witness issue is also important in products liability and toxic exposure cases. Some parts of the discussion touch on these fields. Some conclusions, such as expert witness immunity, controlling bias, apply to expert witnesses in all fields.

CHAPTER TWO DEFINING EXPERTISE

A. Expert Qualification

In the language of Federal Rules of Evidence 702, a witness qualifies as an expert “if scientific, technical, or other specialized knowledge will assist the trial 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”. This is too broad to be applied in a specific field. A more objective and definite standard of expert medical witness qualifications would decrease the cost and length of the testimony evaluation. Obviously, this is the first step to keep “junk science” out of the door of the courtroom.

1. Background

In spite of the necessity of expert witness qualifications, there historically have been few restrictions on expert witness qualifications. The witnesses did not have to demonstrate competence regarding a particular issue in the case. Even two decades ago, the judge in a medical malpractice case said, “A medical expert need not be a specialist in the area concerned nor be practicing in the same field as the defendant”.²³ This was mainly because of the difficulty litigants in medical

²³ See *Letch vs. Daniels*, 514 N.E.2d 675, 677 (Mass. 1987), see also Graham C. Lilly, *An Introduction to the Law of Evidence* 557, 570 (2nd ed, 1996) (‘A general practitioner of medicine can qualify as an expert on a specialty within medicine even though there are specialists who are more

malpractice cases historically faced in finding competent expert witnesses. In the past, the standard of physicians' negligence was established by the locality rule, which meant a medical practitioner's conduct was assessed based on the standard in the community where he practiced. This meant that the expert witness who was hired to testify had to learn the local standard. Thus the locality rule greatly limited the pool of expert witnesses. It would make things worse if the rule required that expert witnesses be familiar with the practice in the defendant's field. Because generally physicians were unwilling to testify against local colleagues, for fear of damaging his reputation in the community and professional solidarity. Taking this situation into consideration, courts took a liberal attitude towards expert qualifications. Thus at that time courts allowed non-specialists to testify against specialists, and specialists in one field to testify against specialists in another field.²⁴

Naturally, this liberal rule substantially expands the pool of potential experts. Some doctors even make their living primarily by providing consulting services and expert testimony to attorneys throughout the United States.²⁵ Especially now that the national standard has replaced the locality rule, it is no longer difficult to find an expert witness. On the contrary, the real problem of the last decade is "junk science" and "quack experts" resulting from the use of unqualified witnesses. In light of this situation, some courts have begun to set some requirements for the qualification of expert witnesses.²⁶

knowledgeable within the restricted field.')

24 See David E. Bernstein Improving the qualifications of experts in medical malpractice cases, 1 Law, Probability & Risk 9,10(2002).

25 See Hall vs. Hilbun, 466 So.2d 856, 875 (Miss. 1985).

26 Thomas vs. University of Chicago Lying-In Hosp., 583 N.E.2d 73, 77 (Ill. Ct. App. 1991) (excluding testimony of pediatrician against obstetrician because expert had never practiced obstetrics, and 'more importantly,' had never treated postpartum bleeding); Lawson vs. Elkins, 477

Some states set these requirements in statutes. For example, West Virginia's law specifically requires that: (a) the opinion is actually held by the expert; (b) the opinion can be testified to with reasonable medical probability; (c) such expert possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care . . . ; (d) such expert maintains a current license to practice medicine in one of the states of the United States; and (e) such expert is engaged or qualified in the same or substantially similar medical field as defendant health care provider.²⁷ Obviously, this is a thorough statute which provides a definite and detailed standard for expert qualification. However, it has been criticized as being unconstitutional. In Gilman v. Choi, the court held it was an abuse of discretion for the circuit court to require plaintiff's expert to have the same board certification as the defendant physician.²⁸ Then in Mayhorn v. Logan Medical Foundation, the Supreme Court struck down the same or similar requirement as unconstitutional.²⁹ The approach of the Supreme Court to expert witnesses in West Virginia's actions was toward admissibility where there was a minimal showing of qualifications, determined on a case-by-case basis.³⁰

Some other states have passed statutes which require an expert physician to be trained, experienced, and certified in the same specialty as a specialist defendant. Connecticut requires that an expert testifying in a medical malpractice action have had an active involvement in the practice or

S.E.2d 510, 511-12 (Va. 1996) (excluding testimony by neurosurgeon who had never performed or observed specific procedure in question).

27 W. Va. Code § 55-7B-7 (2002).

28 406 S.E.2d 200,200 (W. Va. 1991).

29 454 S.E.2d 87, 87(W. Va. 1994).

30 See Mayhorn, 454 S.E.2d at 94.

teaching of medicine within the five-year period before the incident giving rise to the claim.³¹ In Kansas, medical experts must have spent at least 50% of the two-year period prior to the malpractice action in active clinical practice.³² In Texas, an expert witness must be practicing at the time of the testimony or have practiced at the time the claim arose.³³ Like in West Virginia, some scholars think these statutes as effective on restraining quack experts on one hand, but on the other hand, they are so strict as to keep valuable testimony out of courtroom.³⁴

2. Analysis

Developing standards for expert qualifications is a balancing art. If standards are too liberal, junk science may be introduced into courtroom, as history has proven; if they are too strict, competent experts are barred from being witnesses and the costs of finding a qualified expert increase. For example, some non-practicing physicians are not qualified to testify under the statutes, but they just retired from work and they are actually competent to testify in the case. Perhaps litigants would like to hire such retired physicians since retired doctors could charge less and spend more time on testifying. Furthermore, sometimes the requirement that the witness must be qualified in the same or substantially similar medical field as the defendant physician works in an opposite way. In Petkus

31 Conn. Gen. Stat. Ann. Section 52-184c (West 1999).

32 Kan. Stat. Section 60-3412 (1994).

33 Tex. Rev. Civ. Stat. Ann. art. 4590i, subch. N. Section 14.01 (2000).

34 See David E. Bernstein Improving the qualifications of experts in medical malpractice cases, 1 Law, Probability & Risk 9,14 (2002).

vs. Girzadas,³⁵ the decedent died when negligent post-operative treatment by an orthopedist resulted in cardiac arrest. The court allowed a cardiologist to testify against the orthopedist.³⁶ The court held that the decedent died of congestive heart failure, not a broken leg. Defendants' skills, experience or knowledge as orthopedic surgeons are not relevant...³⁷. This case exposes the defect of written rules. No matter how detailed and how logical they look, rules cannot take everything into account.

The West Virginia Supreme Court ruled that the court should decide expert qualifications on a case-by-case basis even if an expert meets the minimal standard set by statutes.³⁸ This approach sounds flexible. However, this flexible approach presents some new problems. First of all, evaluating experts individually, on a case-by-case basis, without any principles or guidelines, will be costly, time-consuming, and contrary to the interests of justice. Second, what should the minimal standard be? According to the West Virginia Supreme Court, the minimal standard is laid out in Rule 702 of the West Virginia Rules of Evidence.³⁹ Some scholars suggest that only scientists from accredited laboratories, or with degrees from accredited medical and other graduate schools, or with a particular number of years of experience in a specific field, will meet this standard. Scientists and physicians may only claim expertise in fields that are part of their respective scholarly curricula

35 Petkus vs. Girzadas, 532 N.E.2d 333,333 (Ill. App. 1988).

36 Id. At 337.

37 Id.

38 See Mayhorn, 454 S.E.2d at 94.

39 The rule states: "if scientific, technical, or other specialized knowledge will assist the trial 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.

unless they have demonstrated the requisite amount of experience in another specific field.⁴⁰ But what should accredited medical and other graduate schools be? How many years of experience should be required? Does this approach solve problems or create new problems? Is this approach flexible or not? With these questions in mind, I will present a new method.

3. A New Method

A constructive proposal has been put forward regarding this qualification problem. The reasonable patient standard asks whether a well-informed reasonable person who suffered from the medical condition involved in the case would seek advice from the proffered expert physician regarding his condition. If so, the expert is qualified.⁴¹ Compared with the case-by-case approach, this test sets a universal standard for all cases. Compared with those rules that allow only experts who share the same medical specialty to testify against each other, the reasonable patient standard is more liberal and more efficient in some sense. The critical problem regarding expert qualifications is whether the proffered expert has knowledge of the customary and accepted practices of the defendant. Doctors of different specialties may “overlap” areas of expertise. Doctors without accredited medical degrees may be proficient in practice. There are always some people who have the ability to testify but for various reasons fail to meet the requirements of qualification statutes.

⁴⁰ See David J. Damiani, *Proposals for reform in the evaluation of expert testimony in pharmaceutical mass tort cases*, 13 *Alb. L.J. Sci. & Tech.* 517,522(2003).

⁴¹ See David E. Bernstein *Improving the qualifications of experts in medical malpractice cases*, 1 *Law, Probability & Risk* 9,17(2002).

Litigants are free to hire these kinds of experts under the reasonable patient standard. The flexibility of this test can remedy the rigidity problems of written statutes. Although some people might worry that subjective standards allow room for judicial abuse of discretion, this test is consistent with the general practice of torts. In many areas of torts, we adopt a “reasonable person”, a “reasonable professional” standard. Since these standards can be applied appropriately, the reasonable patient standard can be used as well. In my opinion, the reasonable patient standard strikes an effective balance between strict and liberal approaches. But the reasonable patient standard is novel. Its practical effect can only be verified after being adopted.

B. Admitting Expert Testimony

The second step towards controlling junk science is examining expert testimony itself. This is even more important than examining expert qualification. “Something does not become scientific knowledge just because it is uttered by a scientist.”⁴² Courts always pay more attention on testimony than experts. The standard of scientific admissibility of testimony has spawned numerous articles, symposia, and informal discussions in recent years. From the Frye general acceptance test to the Daubert test, the relevant standard has been a subject of a great debate. After the Daubert test, scholars continue to make efforts to improve it.

⁴² See 43 F.3d 1311, 1315-16. (9th Cir. 1995).

1. The Frye Test

In 1923 Frye v. United States⁴³, the Court of Appeals for the District of Columbia considered the admissibility of evidence derived from a systolic blood pressure test.⁴⁴ The court noted:

“Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”⁴⁵

The Frye case established the general acceptance standard. This test requires a two-step analysis. First, the court must identify the scientific community in which the underlying principle falls.⁴⁶ Second, it must be determined whether members of the identified scientific community have generally accepted the principle.⁴⁷

43 Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

44 *Id.* At 1014.

45 *Id.* At 1014-1020.

46 See, e.g., Reed v. State, 391 A.2d 364, 368 (Md. Ct. App. 1978).

47 Andrew R. Stolfi, Why Illinois Should Abandon Frye's General Acceptance Standard For The Admission Of Novel Scientific Evidence, 78 *Chi.-Kent. L. Rev.* 861, 866(2003).

Since this case, the merits and flaws of the Frye general acceptance test have been discussed extensively. Courts have pointed out four merits of the test: (1) The standard is judicially manageable; (2) the standard saves judicial time and resources; (3) the standard assures that juries will not be misled by unproven, unsound 'scientific' procedures, thus safeguarding the court's truth-finding role; and (4) the standard assures fairness and uniformity of decision-making.⁴⁸ However, flaws are also apparent. First of all, while the Frye standard requires general acceptance by the relevant scientific community, it fails to provide guidance as to who makes up that community.⁴⁹ Actually, the size of the scientific community chosen is a decisive factor in the Frye test. If drawn too narrowly, the so-called general acceptance does not make any sense; if too broadly, it is likely impossible for evidence to be generally accepted by the community. Similarly, how much acceptance can be viewed as general acceptance is also an important but vague question. Courts have also criticized Frye for being too rigid and narrowly focused on a single reliability factor: general acceptance by scientists. This narrow focus not only directs trial courts away from the true issue to be resolved -- reliability and scientific validity -- but also forces trial courts to determine the reliability issue without considering a wide range of reliability factors.⁵⁰ Under this test some testimony on experimental science would be excluded though it is reliable and relevant. Last, trial courts play a

48 Zayas, 546 N.E.2d at 517-18.

49 Andrew R. Stolfi, Why Illinois Should Abandon Frye's General Acceptance Standard For The Admission Of Novel Scientific Evidence, 78 Chi.-Kent. L. Rev. 861, 870(2003).

very passive role in applying this test, leading to claims of judicial abdication. Because of these criticisms, very few states now use the Frye test.⁵¹

2. The Daubert Test

In 1993 Daubert v. Merrell Dow Pharmaceuticals, inc.,⁵² the Supreme Court displaced Frye in a landmark decision. In this case, the Dauberts alleged that their children's birth defects were caused by the mother's ingestion of Bendectin, an anti-nausea drug. Merrell Dow moved for summary judgment relying upon the affidavit of an epidemiologist who had reviewed the 30 published studies concerning Bendectin, none of which connected the drug to birth malformations. Plaintiffs countered with eight experts who connected the causation dots by reference to test tube and animal studies, pharmacological comparisons of Bendectin and substances known to cause birth defects, and a "re-analysis" of the previously published epidemiological studies. The district court, affirmed by the United States Court of Appeals for the Ninth Circuit, discounted plaintiffs' experts because their methodologies were not "generally accepted" within the medical and scientific communities, and consequently granted summary judgment for Merrell Dow.⁵³

The Court ruled that judges should be gatekeepers in order to ensure that expert testimony

50 See *State v. Porter*, 698 A.2d 739, 750 (Conn. 1997).

51 Robert J. Goodwin, *Fifty Years Of Frye In Alabama: The Continuing Debate Over Adopting The Test Established In Daubert V. Merrelle Dow Pharmaceuticals*, 35 *Cumb. L. Rev.* 231,231(2004).

52 *Daubert v. Merrell-Dow Pharm., Inc.*, 509 U.S. 579,579 (1993).

53 *Id.*

admitted be both reliable and relevant. In determining scientific reliability, several factors serve to guide the judge. These factors include: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential rate of error is acceptable; and (4) the existence and maintenance of standards and controls; (5) whether the theory or technique is generally accepted.⁵⁴

The Daubert test received extensive recognition from its inception. Although it was created by the federal courts, many state courts changed their standard from the Frye to the Daubert test.⁵⁵ The Frye general acceptance test tends to be vague and abstract. In contrast, the Daubert test, with its testing, peer review and publication, error rate, and controlling requirements, is more concrete. In addition, the Frye test narrowly focuses on a single reliability factor, while the Daubert test uses a much wider range of factors. The Daubert factors are flexible, which means a trial court is free to use any number of factors in order to ensure the reliability of scientific evidence. Although general acceptance may be one way to prove the scientific validity of a technique or method, it is not the only way to prove validity and is not a scientifically created method.⁵⁶ The most important improvement is the judge's role as a gatekeeper. As is stated by Chief Judge Kozinski,

“ Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-Daubert world than before. The judge's task under Frye is relatively simple: to determine whether

⁵⁴ Daubert, 509 U.S. at 590.

⁵⁵ See Heather G. Hamilton, *The Movement From Frye to Daubert: Where do the States Stand?* 38 JURIMETRICS J. 201, 208-09 (1998). (stating that since Daubert, thirty-three states have adopted Daubert, and seventeen states continue to employ the Frye standard).

⁵⁶ *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 399,399 (1998).

the method employed by the experts is generally accepted in the scientific community. Under Daubert, we must engage in a difficult, two-part analysis. First, we must determine nothing less than whether the experts' testimony reflects "scientific knowledge," whether their findings are "derived by the scientific method," and whether their work product amounts to "good science." Second, we must ensure that the proposed expert testimony is "relevant to the task at hand," i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "fit" requirement."⁵⁷

The reasons for gatekeeping expert testimony are twofold: first, experts' observations may be inaccurate; second, experts' conclusion may not fit in the particular case. Scientific validity cannot be equated to evidentiary reliability. It is just as improper for a scientist to rely on a judge to determine scientific validity as it is for a judge to rely on a scientist to determine evidentiary reliability.⁵⁸ However, there is suspicion about a judge's ability to act as a gatekeeper. Judges are just experts on law. Can they be good amateur scientists in medical malpractice cases? Are judges more appropriate gatekeepers than jurors? In our legal system, judges often play a more active role than jurors. Judges are the main decisionmakers. However, judges are just human being. In face of scientific testimony, they are laymen as well as jurors. Some psychological research indicates that

⁵⁷ See 43 F.3d 1311, 1315-16. (9th Cir. 1995).

⁵⁸ Andrew R. Stolfi, Why Illinois Should Abandon Frye's General Acceptance Standard For The Admission Of Novel Scientific Evidence, 78 Chi.-Kent. L. Rev. 861, 872(2003).

judges are no better than juries in assessing the scientific worth of expert opinion.⁵⁹ In spite of this, judges have some advantages over jurors. Judges are repeat decisionmakers. “People who repeat the decision making-process many times in the presence of feedback regarding their accuracy are more likely to make accurate judgments.”⁶⁰ Judges receive more feedback than juries through the appellate process, and through legal scholarship and commentary. In addition, “individual judgments under conditions of accountability are more likely to be careful and thoughtful than group judgments without individual accountability.”⁶¹ Therefore judges can be expected to make more efficient evaluations of expert testimony than jurors. This is the necessity that the Daubert court required judges to be gatekeepers.

3. After Daubert

The Daubert test provides some guidance for evaluating expert testimony which is far from all. After Daubert, courts need more factors at their disposal to determine whether or not to admit expert scientific evidence,⁶² for example, the challenge judges face when a case concerns a new, cutting-

59 See Wells, Gary L. (1992). Naked Statistical Evidence of Liability: Is Subjective Probability Enough? 62 *Journal of Personality and Social Psychology*, 739-752 (1999); see also Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, Inside the Judicial Mind, 86 *Cornell L. Rev.* 777 (2001).

60 See Jeffrey J. Rachlinski, The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters, 85 *Cornell L. Rev.* 739, 753 (2000).

61 See Kenneth L. Bettenhausen, Five Years of Groups Research: What We Have Learned and What Needs to be Addressed, 17 *J. Mgmt.* 345, 361 (1991).

62 See Justin P. Murphy, Expert Witnesses at Trial: Where Are the Ethics? 14 *Geo. J. Legal Ethics* 217, 219(2000).

edge science, where reasonable scientists can have great disagreements as to whether or not the testimony would be reliable.

To cure the failings of the Daubert test, scholars continue their efforts to make some improvements. In medical malpractice, a practical model for the standardized analysis of medical negligence has been set up recently.⁶³ An adverse outcome observed in association with treatment is not necessarily a consequence of medical negligence. It might result from background risk. If there were a link between a breach of duty and a poor outcome, the probability for the occurrence of the poor outcome would not be the background risk, but would be significantly higher in statistical terms.⁶⁴ Thus we can judge if there is medical negligence by comparing the different probabilities for the occurrence. Further the treatment can be divided into seven phases. In every phase there are two options: the safest effective treatment and alternative treatment. To compare the risk of the specific treatment rendered with the risk of the safest effective hypothetical treatment, one should determine the background risk, the safest effective treatment, the alternative treatment, the observed risk and do hypothesis testing. After such a five-step process, one can come to a conclusion whether there is medical negligence.⁶⁵

63 See Howard Smith, A model for validating an expert's opinion in medical negligence cases, 26 J. Legal Med.207, 207(2005).

64 Id. At 208.

65 Id. At 208-14.

This model is standardized and quantitative, while the rationale is easy to understand. This might cure Daubert's failings to some extent. But this method is novel and has not been verified by practice. Before it is widely accepted by judges, the Daubert test will continue to control the admission of expert testimony.

CHAPTER THREE REGULATING NEGLIGENCE

When an expert witness negligently caused the loss to his client, is he liable for his client? This is a really controversial issue. As has been pointed out, an expert medical witness plays two different roles in a case. On one hand he can be viewed as a businessman who sells his specific knowledge to litigants and makes profits from this activity; in response to the market mechanism, the negligent expert witness should be liable for his conduct. On the other hand, as a witness, he serves the court and safeguards its integrity. The rules of evidence grant the same privileges on expert witnesses as on common witnesses, which makes them escape control of contracts or tort law. Experts often argue that witness immunity can exempt them from any civil liability, or expert testimony is not even a “practice of medicine.” Are these arguments adoptable? What attitude should we take towards expert’s negligence?

A. Does Medical Expert Witness Testimony Constitute the Practice of Medicine?

Professional liability is only attached to professional activities. For example if a physician causes a car accident in which someone is injured, he is liable for the harm, but it is not professional liability. In the same way, some people object to the idea that an expert medical witness should bear professional liability for his testimony. In their opinion, giving expert testimony is a game, a diversion, or a way for a physician to augment his income. It is not really practicing medicine, or so the logic goes, and one is not bound by the rules of ethics and standards that would apply to a

surgeon in an operating room.⁶⁶ However, there is a growing realization that serving as an expert witness in a professional liability suit is in fact practicing medicine. Then the real problem here is that whether expert medical witness testimony constitutes the practice of medicine.

Nearly every state has its own definition of the term “practice of medicine.” In the language of Alabama § Code 34-24-50⁶⁷, practice of medicine includes any act “to diagnose, treat, correct, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality.”⁶⁸ In Georgia, to practice medicine means “to hold oneself out to the public as being engaged in the diagnosis or treatment of disease, defects or injuries of human beings; or the suggestion, recommendation, or prescribing of any form of treatment for the intended palliation, relief, or cure of any physical, mental, or functional ailment or defect of any person with the intention of receiving therefore, either directly or indirectly, any fee, gift, or compensation whatsoever; or the maintenance of an office for the reception, examination, and treatment of persons suffering from disease, defect, or injury of body or mind;.....”⁶⁹ All of the Medical Practice Acts of the remaining states are general and remain silent on the specific question of whether expert medical witness testimony is included within the definition of the practice of medicine.⁷⁰ In the absence of specific statutory language to the contrary, expert medical witness testimony cannot be excluded from the definition of the practice of medicine.

66 Russell M. Pelton, Medical Societies' Self-Policing of Unprofessional Expert Testimony, 13 Ann. Health L. 549,553(2004).

67 Ala. Code § 34-24-50 (1991).

68 Id.

69 O.C.G.A. §43-34-20 (2005).

70 See Fred L. Cohen, The Expert Medical Witness in Legal Perspective, 25 J. Legal Med. 185,188(2004).

The current definitions are so broad as to encompass any aspect of direct patient care, including examinations, surgery, and the exercise of professional judgment.⁷¹ The legislators just leave this problem to specialized departments, like medical licensing boards and courts.

In a study conducted in 1997 surveying the allopathic medical licensing boards of all fifty states, forty-one percent expressed uncertainty as to whether a medical expert witness is practicing medicine.⁷² Similarly, seventy-two percent of the medical licensing boards reported that they had never disciplined a physician witness for fraudulent courtroom testimony.⁷³ Recently some cases indicate the intention of state medical boards that interpret statutes to include expert testimony within the definition of practice of medicine.⁷⁴ This trend reflects that state medical boards are trying to police expert witnesses in a way they have not done so in the past. The state medical board systems have two key functions: gate-keeping via licensure and quality control via standard-setting and disciplines.⁷⁵ The functions of state licensure and discipline are limited to "practice of medicine." To exert a broader regulation, implicitly or explicitly, the state may interpret a controversial concept to mean the practice of medicine.⁷⁶

71 Id.

72 Douglas R. Eitel et al., *Medicine on Trial: Physicians' Attitudes about Expert Medical Witnesses*, 18 J. Legal Med. 345, 350 (1997).

73 Id.

74 See *Missouri Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440,440 (Mo. App. 1991), *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967,967 (7th Cir. 2001).

75 See, e.g., *Sugarman v. Bd. of Registration in Med.*, 662 N.E.2d 1020, 1023 (Mass. 1996).

76 Nicolas P. Terry, *Prescriptions sans Frontieres (or How I Stopped Worrying About Viagra on the Web but Grew Concerned About the Future of Healthcare Delivery)*, 4 Yale J. Health Pol'y L. & Ethics 183(2004).

The attitude of courts is quite split on this issue. Two cases with similar facts but very different outcomes provide an illustration. In Missouri Board of Registration for the Healing Arts v. Levine,⁷⁷ an otolaryngologist made a false statement while testifying under oath as a medical expert.⁷⁸ He was sued by the Board for violation of two provisions of Missouri law. The Board argued that testifying as a non-treating physician constitutes the practice of medicine because the physician uses his or her knowledge of a particular field to analyze the propriety of another practitioner's actions. Levine argued that all of the Board's cases that discuss the practice of medicine define it as the diagnosis and treatment of the sick. Finally the court held that the giving of expert testimony by a non-treating physician was not the practice of medicine as defined under Missouri law.⁷⁹

However, in the recent landmark decision of Austin v. American Ass'n of Neurological Surgeons,⁸⁰ the Seventh Circuit Court of Appeals came to an opposite conclusion. Dr. Donald Austin, a Detroit neurosurgeon, who provided inappropriate and unprofessional testimony as a plaintiff's expert in a medical malpractice case, argued that he had never provided medical care for the patient.⁸¹ The court accepted the argument of the AANS and AMA that giving expert testimony constituted practice of medicine.⁸¹ Judge Posner pointed out that although Dr. Austin did not treat

77 Id.

78 Id..

79 Id.

80 Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967,967 (7998tir. 2001).

81 Id. At 975.

the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service.⁸²

In light of all these arguments, it is hard to tell which opinion is more convincing. Logically, the essence of practicing medicine is to provide medical service by exercising professional knowledge and abilities. The biggest difference between medical testimony and traditional practice of medicine is whether a physician is engaged in the direct treatment of a patient. Is direct contact with a patient necessary? Pelton gives some examples. If a physician is called in by a practitioner in another area to consult on a case, it is common knowledge that he or she is practicing medicine. In some states physicians who provide medical advice via the internet to individuals who they never see are held to be practicing medicine without a license if they are not licensed in the State where the patient resides.⁸³ Nowadays internet-based prescribing and dispensing are poised to become major components of healthcare delivery in the United States: In 2003, eighteen percent of online U.S. households purchased prescription drugs online, a number expected to grow to twenty-seven percent in 2004.⁸⁴ In response to the development of internet-based prescribing, the traditional understanding

82 Austin, 253 F.3d at 974.

83 Russell M. Pelton ,Medical Societies' Self-Policing of Unprofessional Expert Testimony, 13 Ann. Health L. 549,556(2004).

84 Eric G. Brown with Bradford J. Homes et al., Forrester's Top 10 Healthcare Predictions for 2004 (Dec. 15, 2003), at

of “practice of medicine ” has to be broadened. The direct treatment of a patient is no longer necessary. In this situation, expert testimony can be a type of practice of medicine even without direct treatment of a patient.

However, law cannot be just logical. It should take social policies into account. On one hand, to confirm expert testimony to be “practice of medicine”, further, to hold negligent expert witnesses liable, will force them to be more careful with their testimony; on the other hand, it might over-deter and dissuade potential experts from participating in civil litigation. Although experts are driven to the court by the motivation of money, they may make money in other ways which do less harm to their reputation even if they are negligent. Thus the costs to find a competent expert will increase for litigants. To strike a balance between experts and litigants, I suggest that expert witnesses should be held liable for their gross negligence.

B. Does Witness Immunity Exempt Expert Witnesses from Civil Liabilities?

Since expert testimony represents the practice of medicine, the same standard of professional acts and professional ethics should be imposed on expert medical witnesses. As the logic goes, if an

<http://www.forrester.com/ER/Research/Brief/0,1317,33444,00.html>.

expert medical witness fails to do what a reasonable physician would do in the same situation, the expert should be held professionally liable. However, this apparent responsibility is often exempted by the reason of witness immunity, which results from the expert's role as a witness. Should witness immunity exempt expert witnesses from civil liabilities? Maybe not.

1. Witness Immunity: What and Why?

The common law doctrine of witness immunity originated in English law.⁸⁵ Originally the immunity doctrine operated as an exemption from liability for the speaking or publishing of defamatory words concerning another, based on the fact that the statement was made in the performance of a political, judicial, social, or personal duty.⁸⁶ Three English common law cases, Cutler v. Dixon,⁸⁷ Anfield v. Feverhill,⁸⁸ and Henderson v. Broomhead,⁸⁹ reveal that the immunity originated in the limited area of defamation law. The doctrine has developed in some situations to permit witnesses to speak freely in court,⁹⁰ and to grant witness immunity against the use of any

85 See Black's Law Dictionary 1077 (5th ed. 1968).

86 Id.

87 4 Co.Rep. 14b, 76 Eng.Rep. 886, 886 (Q.B.1585).

88 2 Bulst. 269, 80 Eng.Rep. 1113, 1134 (K.B.1614).

89 4 H & N 569, 157 Eng.Rep. 964, 968 (Ex.1859).

90 See Christopher M. McDowell, Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness, 28 U. Mem. L. Rev. 239(1997).

evidence provided by or resulting from testimony.⁹¹ This has broadened the original witness immunity substantially. Most American jurisdictions qualified the immunity doctrine by limiting the protected statements to those relevant to the judicial proceeding.⁹² Generally witness immunity can be applied to communication: (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of litigation, (4) with some connection or logical relation to the action.⁹³ Broadly speaking, the American immunity shields the witness from suit based on the witness' testimony regardless of the witness's motive or the truth of the statement as long as the statement is relevant to the judicial proceeding.⁹⁴

When it comes to witness immunity, some people may use the 5th Amendment⁹⁵ as a defense. The privilege created by the 5th Amendment is a right to refuse to testify against oneself. Although witnesses have an obligation to testify in the court, it is unfair to force a criminal defendant to testify against himself. Similarly, case law developed some other situations where witnesses can refuse to testify. These situations include when the witness has a justifiable fear of self-incrimination and when the witness is so closely connected with the defendant by the facts of the case, the pleadings, or relationship.⁹⁶ A husband has the right to refuse to testify against his wife. A lawyer has the right

91 See 18 U.S.C. 6002 (1994).

92 Randall K. Hanson, Witness Immunity Under Attack: Disarming Hired Guns, 31 Wake Forest L. Rev. 497, 497 (1996).

93 Opinion and Expert Testimony in Federal and State Courts, Sponsored with the cooperation of the Federal Judicial Center, SK075 ALI-ABA 319.

94 Randall K. Hanson, Witness Immunity Under Attack: Disarming Hired Guns, 31 Wake Forest L. Rev. 497, 499 (1996).

95 U.S. Const. 5th Amend.

96 See Russell Dean Covey, Beating The Prisoner At Prisoner's Dilemma: The Evidentiary Value Of A Witness' Refusal To Testify, 47 Am. U.L.

to refuse to testify against his client. This privilege is often granted in criminal cases. Obviously, this right to refuse to testify is completely different from witness immunity we are discussing. Under the federal use immunity statute, prosecutors may grant immunity to such a witness and then compel the witness to testify.⁹⁷

Testimony is the foundation upon which to build a case. Courts always try their best to acquire all relevant testimony. Witnesses play an important role in collecting testimony. Witnesses are viewed as friends of the court who came forward to assist in the attempt to achieve justice and who were granted immunity from liability so as to encourage their open participation and assistance.⁹⁸ The common law doctrine of witness immunity is a mechanism that permits witnesses to speak freely and encourages full and frank testimony. Although highly valued, witness immunity is not always granted absolutely. Historically, there have been two types of witness immunity: absolute immunity and conditional immunity. Absolute immunity protects witnesses from liability regardless of the witness' motive or the truth of the statement, while conditional immunity exempts witnesses from liability only when the statement is made without malice.⁹⁹ Usually the rule of absolute immunity for testimony is confirmed in such situations where a witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has

Rev. 115,116(1997).

97 Id. At 120.

98 Randall K. Hanson, Witness Immunity Under Attack: Disarming cHired Guns,c 31 Wake Forest L. Rev. 497, 497 (1996).

99 See Christopher M. McDowell, Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness, 28 U. Mem. L. Rev. 239, 245(1997).

some relation to the proceeding.¹⁰⁰ The decision whether to protect the witness by absolute immunity depends on the importance of the social interest promoted by the witness. If the interest is of special importance, the witness may be protected by absolute immunity. If the interest is relatively less important, the witness may be protected by conditional immunity.¹⁰¹

2. Expert Witness: Absolute or Conditional Immunity?

Because of the importance of expert testimony, the witness immunity doctrine was expanded to cover expert witnesses. It was pointed out that if an expert witness could be sued based on her performance in the courtroom, his or her testimony might be distorted by a desire to avoid a subsequent lawsuit.¹⁰² To encourage frank testimony, some courts granted experts absolute immunity.

The expert's testimony may injure either the party hiring the expert or the opposing party.¹⁰³ If the expert witness caused the injury of the adversary party and was sued for defamation, should he or she be afforded witness immunity?¹⁰⁴ If the expert witness acted unreasonably and caused the loss of the hiring party, should he or she be exempted from professional liability?

100 Restatement (Second) of Torts, § 588 (1977).

101 See W. Page Keeton et al., Prosser and Keeton on The Law of Torts 114, at 816 n.3 (5th ed. 1984).

102 Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 776 P.2d 666, 667 (Wash. 1989) (en banc).

103 See McDowell, *supra* note 87, at 242.

104 Although the remedy sought by the opposing party for injury caused by an expert's testimony is irrelevant to the expert's professional negligence, I explore this issue here because of its relevance to the next part of this paper.

a. Immunity from Lawsuits Brought by Opposing Parties

When the expert's testimony at trial is false and causes injury to the adverse party, generally the only potential action available to the adverse party is one based on defamation.¹⁰⁵ Since by common law tradition, litigators have been given absolute privilege to defame in the judicial proceeding,¹⁰⁶ expert witnesses are often afforded absolute immunity in these lawsuits. A few cases illustrate this situation. In Clark v. Grigson,¹⁰⁷ a Texas case, a convicted felon sued a psychiatrist who had testified adversely in the punishment stage of the plaintiff's criminal trial. The plaintiff sought damages on the theory that the psychiatrist negligently made an improper diagnosis, which resulted in heavier sentences than the plaintiff would have received if the psychiatrist had made an accurate diagnosis.¹⁰⁸ In support of liability for expert witness negligence, the plaintiff argued that improper expert testimony would occur less frequently if experts [were] civilly liable for damages for negligence in reaching the conclusions to which they testify. The court of appeals rejected this argument, finding it more than counterbalanced by the policy of affording witnesses absolute immunity in order to encourage unrestrained testimony.¹⁰⁹

¹⁰⁵ See McDowell, *supra* note 87, at 243.

¹⁰⁶ See Stuart M. Speiser et al., *The American Law Of Torts?* 29:87, at 597 (1991), (the rule of absolute privilege from liability for defamation is alive, well, and flourishing.)

¹⁰⁷ See 579 S.W.2d 263 (Tex. Civ. App. - Dallas 1978, writ ref'd n.r.e.).

¹⁰⁸ *Id.* At 264.

¹⁰⁹ *Id.* At 265.

In another Texas case, James v. Brown,¹¹⁰ decided in 1982, Marguerite James sued three psychiatrists who had filed reports with a Texas probate court concerning James' mental competency.¹¹¹ James was hospitalized for observation and was examined by three psychiatrists who filed reports stating that the plaintiff was not of sound mind, was not competent to handle financial affairs, and was likely to cause injury to herself if she were not restrained.¹¹² James was later released, and she sued the doctors who had indicated that she was incompetent.¹¹³ In her complaint, James alleged libel, negligent misdiagnosis, medical malpractice, false imprisonment, and malicious prosecution.¹¹⁴ The false imprisonment and malicious prosecution claims were dismissed for failure to state a cause of action.¹¹⁵ Under the libel claim, the Texas court protected the doctors from liability for allegedly defamatory statements, citing the Restatement of Torts as the basis for absolute protection from defamation claims.¹¹⁶ The court held that no statements in a judicial proceeding can give rise to a civil action for libel or slander, regardless of negligence or malice as long as the statement has some relation to the proceeding.¹¹⁷

As has been pointed out, the ground of this kind of absolute immunity is the balance between social interests and individual's rights. In cases where an adverse party can prove that a witness

110 James v. Brown, 637 S.W.2d 916, 916 (Tex. 1982).

111 Id.

112 Id. At 918.

113 Id. At 920.

114 Id.

115 Id, at 921.

116 Id, at 922-924.

made a statement with malice and that the statement caused damage to the adverse party, there are two kinds of interests in conflict: (1) the individual's right to enjoy his good reputation and (2) the public's interest in the full and free disclosure of facts in legislative, executive, and judicial proceedings.¹¹⁸ If immunity were upheld, the rights of the adverse party would be damaged while the courts acquire the benefits of full and frank testimony. If expert witnesses are concerned about being sued by clients, they may testify in ways they anticipate will minimize their liability or may be unwilling to participate.¹¹⁹ Therefore, although a malicious statement that damages the reputation of an individual will generally be actionable, the proper balance for testimony is usually made in favor of society, rather than the rights of the individual.¹²⁰ Additionally, all expert witnesses are subject to cross examination, and the threat of perjury charges adequately protects the legal system from erroneous witness statements.¹²¹ With these safeguards, the substantial dangers that an expert witness will present knowingly false testimony which will injure the adverse party's reputation do not exist.

117 Id.

118 See Christopher M. McDowell, *Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness*, 28 U. Mem. L. Rev. 239(1997).

119 Eric G. Jensen, *When Hired Guns Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185, 196 (1993).

120 See, e.g., *Hayslip v. Wellford*, 263 S.W.2d 136, 138 (Tenn. 1953)

121 See *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.*, 776 P.2d 666, 667.

Recently some courts ruled that actions brought by the opposing party against the witness may be stated on alternative grounds.¹²² In response to this, courts have expanded the absolute privilege to bar causes of action other than defamation actions. For example, courts have barred causes of action for intentional infliction of emotional distress, interference with contractual relationship, invasion of privacy, fraud, abuse of process, and negligent misrepresentation.¹²³ Regardless of the kind of action, if the allegations are pertinent to the issues of balance between individual's rights and societal interests, absolute privilege would apply in the most events.

b. Immunity from Lawsuits Brought by Clients

The really controversial issue is whether expert witnesses should be afforded immunity from professional liability alleged by their clients. The courts have split on this issue. In the famous 1989 case Bruce v. Byrne-Stevens & Associates Engineers Inc.,¹²⁴ two property owners sued their neighbor, John Nagle for the cost of restoring lateral support for their land.¹²⁵ Nagle had conducted excavation work on his property which allegedly damaged the adjacent property. The property owners hired ByrneStevens, an engineering firm, to calculate and testify as to the cost of stabilizing

122 See, e.g., *Lann v. Third Nat'l Bank*, 277 S.W.2d 439 (Tenn. 1955), *Bruce*, 776 P.2d at 670.

123 See Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 Ohio St. L.J. 985, 998 (1993); see also *General Elec. Co.*, 916 F.2d at 1125.

124 See *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.*, 776 P.2d 666, 666 (Wash. 1989).

125 *Id.*

the soil on their land.¹²⁶ Byrne, as an expert witness for the property owners, testified that the total cost of stabilizing the land would be \$ 21,040.¹²⁷ The court awarded that exact amount to the property owners. The estimates turned out to be grossly underestimated, and it actually cost double that amount to restore the property.¹²⁸ The property owners sued Byrne for his testimony. The property owners contended that the engineer was negligent in preparing his analysis and that, but for [the engineer's] low estimate of restoring lateral support, they would have obtained judgment . . . for the true cost of the restoration.¹²⁹

The trial court protected the witness based on immunity, but the court of appeals reversed.

¹³⁰The court of appeals held that the defendant expert should not be afforded immunity:

“Byrne is a professional, with a pecuniary motive for testifying. He voluntarily undertook to render his expert opinion in the original action, knowing that the parties and the court would rely on that opinion. He was not merely a bystander who fortuitously came to have information relevant to the claim, nor was he subject to contempt of court if he refused to assume this undertaking.”¹³¹

126 Id. At 667-69.

127 Id.

128 Id.

129 Id.

130 Id. At 667-70. (Wash. 1989). About the discussion of this case, see also Lesile R. Masterson, Witness Immunity or Malpractice Liability for Professionals Hired as Experts? 17 Rev. Litig. 393, 396(1998).

131 776 P.2d at 669 (Wash. 1989).

Then a divided Washington Supreme Court reversed the court of appeals.¹³² The court noted that, without immunity, experts would lose objectivity and would most likely adopt the most extreme position favorable to their client.¹³³ The court also feared that the imposition of liability would discourage anyone who was not a full-time professional expert witness from testifying.¹³⁴ The court was also concerned that one-time or infrequent experts would not carry the necessary insurance to cover the liability risk in testifying.¹³⁵

The dissent in *Byrne-Stevens* argued that the purpose of absolute witness immunity was to prevent an unhappy litigant from bringing a defamation suit against an adverse party, not to shield an expert from otherwise actionable professional malpractice.¹³⁶ Imposing civil liability upon experts, the dissent argued, would not significantly affect the fact-finding function of the court.¹³⁷ The dissent reasoned that while some experts would be intimidated by the spectra of malpractice liability, other experts possessing the same knowledge would be willing to serve.¹³⁸ The dissent objected to the majority's holding as violating common sense, arguing that the professional's malpractice outside the courtroom should not be immunized by subsequent publication of her opinion in a court of

132 Id. At 670.

133 Id.

134 Id. At 672.

135 Id.

136 Id.

137 Id.

138 Id.

law.¹³⁹ Moreover, the dissent argued, the oath of a witness and cross-examination do not protect the client from the experts' unintentional negligence or matters that the adversary chooses, most probably in his or her self interest, not to contest.¹⁴⁰

Although witness immunity was ultimately afforded in this case, the dissenting opinion fully addressed the theory of expert witness professional negligence fully. In the following several cases the dissents' theory even prevailed.

In Mattco Forge v. Arthur Young & Co.,¹⁴¹ Mattco Forge, a manufacturing company, sued Arthur Young, an accounting firm, for negligently providing accounting services.¹⁴² In the underlying case, Mattco filed a federal civil rights action against General Electric (GE), claiming that GE had eliminated Mattco as an approved subcontractor for racial reasons.¹⁴³ Mattco hired Arthur Young as a damage consultant and expert witness to assist in calculating lost profits.¹⁴⁴ GE then alleged that Mattco had fabricated documents with the assistance of Arthur Young.¹⁴⁵ Finally the federal case finally ended before trial in mutual dismissals.¹⁴⁶

Mattco subsequently sued Arthur Young, alleging accounting malpractice.¹⁴⁷ Arthur Young

139 Id.

140 Id. At 675.

141 Mattco Forge v. Arthur Young & Co., 6 Cal. Rptr. 2d 781 (Cal. Ct. App. 1992).

142 Id. At 783.

143 Id.

144 Id. At 784.

145 Id. At 785-86.

146 Id.

147 Id. At 786.

moved for summary judgment, raising as a defense a California statute that provided a litigation privilege.¹⁴⁸ The trial court granted Arthur Young's motion, holding that the statutory litigation privilege barred Mattco's claims as a matter of law.¹⁴⁹ Mattco appealed.

The court of appeals reversed the summary judgment,¹⁵⁰ refusing to apply the litigation privilege to a friendly expert witness and distinguishing *Byrne-Stevens*.¹⁵¹ The court noted that the malpractice suit in *Byrne-Stevens* arose from testimony provided by an expert to the court, whereas the underlying suit in *Mattco* for which Arthur Young was retained never reached trial. The court reasoned that extending the litigation privilege to protect Arthur Young from professional malpractice would not further the policy of encouraging truthful testimony.¹⁵² In addition, the procedural safeguards relied upon in *Byrne-Stevens*¹⁵³ are not present when the witness has not testified at trial - she has not sworn an oath, faced the hazard of cross-examination, or faced the threat of a prosecution for perjury.¹⁵⁴ While acknowledging that the litigation privilege shields litigants, attorneys and witnesses from liability for ... virtually all torts,¹⁵⁵ the court pointed out that the litigation privilege is not absolute.¹⁵⁶ By way of explanation, the court analogized to malpractice

148 Id.

149 Id. At 789.

150 Id.

151 Id.

152 Id.

153 See *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.*, 776 P.2d 666, 666-70 (Wash. 1989).

154 *Mattco Forge v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 790 (Cal. Ct. App. 1992).

155 Id.

156 Id.

suits brought by a party against his former attorney, noting that the litigation privilege does not entirely protect attorneys from suit by a former client.¹⁵⁷

A case which followed the approach of the Mattco court is Murphy v. A.A. Mathews¹⁵⁸. In Murphy, Murphy hired Mathews, as professional engineers, to prepare claims for additional compensation from Zurn Industries, Inc and to present those claims at an arbitration proceeding, if necessary.¹⁵⁹ Mathews testified at the arbitration proceeding on behalf of Murphy for additional compensation in the amount of \$4,888,390.¹⁶⁰ The arbitrators awarded Murphy \$1,118,608, which Murphy believed to be substantially less than his requested compensation.¹⁶¹

Murphy filed suit against Mathews, alleging that Mathews was negligent in its performance of professional services involving the preparation and documentation of Murphy 's claims for additional compensation from Zurn.¹⁶² In the malpractice proceeding, Mathews asked the court to extend witness immunity.¹⁶³

The Missouri Supreme Court then undertook an examination of the history of witness immunity.¹⁶⁴ According to the court, “the primary rationale supporting witness immunity is

157 Id.

158 Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. 1992).

159 Id. At 672.

160 Id.

161 Id. At 673.

162 Id. At 675.

163 Id.

164 Id.

twofold.¹⁶⁵ First, witnesses may be reluctant to testify if they are subject to a retaliatory suit by an aggrieved party.¹⁶⁶ Second, witnesses may be inclined to shade their testimony in fear of a retaliatory suit.”¹⁶⁷ In all previous Missouri cases, the court had applied the doctrine of witness immunity narrowly.¹⁶⁸ Every decision was limited to subsequent actions in defamation or defamation-type lawsuits. Even within the context of defamation, absolute immunity applied only if the statements made were relevant and the court had jurisdiction.¹⁶⁹

“The present case is outside the realm of defamation. It does not involve an adverse witness.”

The court’s reasoning was clear.

“Due to the hired expert witness’ function, we do not believe that the policy of ensuring frank and objective testimony is furthered by granting immunity. In most circumstances, these experts possess no independent factual knowledge concerning the litigation. Instead, they are usually retained to assist a party in preparing and presenting its best case in exchange for a fee. In practice, they function as professionals selling their expert services rather than as an unbiased court servant. Thus, immunizing an expert retained and compensated for providing litigation support services does not advance this underlying policy. We also do not believe that the

165 Id.

166 Id.

167 Id.

168 Id.

169 Id.

threat of liability will encourage experts to take extreme and ridiculous positions in favor of their clients in order to avoid a suit by them. Rather, imposing liability would encourage experts to be careful and accurate.”¹⁷⁰

In all these cases which refuse to extend witness immunity from defamation suits to professional negligence, there is a widely accepted opinion that granting friendly experts immunity would not further frank and objective testimony. Rather, imposing professional liability would encourage experts to be careful and accurate. The latter argument is easy to understand. The reason that granting friendly experts immunity would not further frank and objective testimony has to do with the unique characteristics of the expert witness. Expert witnesses are essentially different from ordinary witnesses in that a certain ordinary witness is indispensable to a particular case while an expert witness is replaceable. There are several reasons for this.

First of all, expert witnesses and ordinary witnesses testify in different ways. According to evidence scholars, ordinary witnesses testify as to what they have seen, heard, or done that is relevant to the issues in the case.¹⁷¹ The testimony of ordinary witnesses is generally limited to those things they have directly observed or experienced, as well as reasonable conclusions that can be drawn on the basis of their sensory perceptions.¹⁷² As the Rule for non-expert witnesses’ states, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that

¹⁷⁰ Id. At 678-9.

¹⁷¹ See Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, 171 (1993)

¹⁷² See Thomas A. Mauet, *Trial Techniques*, 122 (4th ed. 1996).

the witness has personal knowledge of the matter.¹⁷³ In a word, ordinary witnesses testify to the facts of a case. Since the facts cannot be changed, the ordinary witness cannot be replaced. However, expert witnesses testify in the form of opinion. The function of the expert witness is to assist the trial of fact to understand the evidence or to determine a fact in issue by exercising their knowledge, skill, experience, training, or education.¹⁷⁴ “An expert may opine on the cause or consequences of occurrences, interpret the actions of other persons, draw conclusions on the basis of circumstances, comment on the likelihood of events, and may even state her beliefs regarding such seemingly non-factual issues as fault, damage, negligence, avoidability, and the like.”¹⁷⁵ The expert testifies to ideas, concepts, scientific facts, tests, experiments, the results of tests and experiments, and the like that are not within the knowledge of the trial of fact.¹⁷⁶ For this reason, there is always more than one person who is qualified as an expert witness in a particular case. Since the expert witness in a particular case is replaceable, there is no need to overprotect the expert witness from civil liability. After all, witness immunity is applied at the price of other people’s rights and the normal trial order.

Secondly, ordinary witnesses are regarded as unbiased court servants, while expert witnesses testify in the court for the purpose of money. As has been pointed out, the act of testifying as an expert witness is a business transaction within the expert's chosen field of expertise.¹⁷⁷ According to

173 See Fed. R. Evid. 602.

174 The Federal Rules R702.

175 See Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 171 (1993)

176 See Christopher M. McDowell, *Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness*, 28 U. Mem. L. Rev. at 239(1997).

177 Id.

some articles, business for experts is booming, evidenced by the many commercial services and expert databases that stand ready, willing, and able to provide experts to testify within virtually any category or area of specialization. Some advertisements even go so far as proclaiming that their particular expert testimony will result in reaching the greatest possible judgment.¹⁷⁸ There is no difference between this business transaction and engagement in providing a professional service for a fee. Since in a business transaction rights and duties are relative and mutual, the expert witness should take responsibility proportional to his profits. Fairness requires this result. Furthermore, since experts are held to professional standards in other professional-client relationships, they should be accountable to the same standard when serving the court. This will not discourage experts to be witnesses, because their motivation for testifying in the court is making money. Although they can make money in other ways, there seems no reason to prefer other ways than this business since the standards are the same.

Finally, the function of immunity in the professional liability context differs significantly from its role in the defamation context. In the defamation event, whether ordinary witnesses or expert witnesses, they might be held liable to the opposing party even if they testified properly, if without witness immunity. So if courts do not grant immunity to them, they will not speak frankly and freely. Thus the truth may be hidden. In the professional liability context, professionals' testimony is held to a more definite standard. As long as an expert behaves as a reasonable professional should, he will not incur any civil liability from the clients, even if he is not given witness immunity. In this context,

¹⁷⁸ See Blake Fleetwood, From the People Who Brought You the Twinkie Defense: The Rise of the Expert Witness Industry, Wash. Monthly, June 1987, at 33.

witness immunity would only encourage recklessness and “junk” testimony. Furthermore, there is no need to worry about that professional liability will encourage experts to take extreme and ridiculous positions in favor of their clients. The threat of sanctions from courts and professional association will discourage them from doing so.

Some people may argue that without immunity, professional liability would result in never-ending lawsuits. The apparent logic of this argument is misleading. Imposing professional liability on expert witnesses will not increase professional negligence lawsuits. An example will explain why this is true. If a doctor testifies negligently in the court, he may also treat a patient negligently. Let's say this doctor can either perform 10 surgeries or testify in 10 cases within one month. If he testifies and performs surgeries with the same level of care, the possibilities of negligence in these two situations will be the same. If one more lawsuit about professional negligence happens in the context of expert testimony, the professional negligence lawsuits in the event of performing surgeries will decrease by one. Since the amount of professional negligence of the whole society has never been unlimited, the lawsuits of professional negligence in the expert witness situation will be limited.

Because of the unique characteristics of the expert witness, there is no need and no justification for granting them witness immunity. They should behave as an ordinary member of the profession. If they act negligently, they should be professionally liable to their clients.

CHAPTER FOUR CONTROLLING DISHONESTY

A. Phenomenon and Reasons

Although professional negligence is a problem, expert partisanship is an even worse issue. Judges, jurors and even lawyers have recently come to suspect the ethical standards of expert witnesses. In a survey by the Australian Institute of Judicial Administration, twenty-seven percent of Australian judges think that expert witnesses are often biased when testifying in the court; sixty-seven percent of judges think that expert witnesses are occasionally biased.¹⁷⁹ In America, a 1992 poll conducted by the National Law Journal and Lexis found that over thirty percent of jurors polled in civil cases reported that the experts were biased.¹⁸⁰ The lawyer Melvin Belli said: If I got myself an impartial witness, I'd think I was wasting my money.¹⁸¹ In articles expert witnesses are often described as “hired guns,” “prostitutes” or “actors.”¹⁸² A past president of the Defense Research Institute observed, if you put on a Hollywood actor as a physicist, he's going to convince the jury. Albert Einstein, on the other side, might lose since he's not articulate; he's a frumpy guy who hasn't had a haircut in three years.¹⁸³ Bias happens often.

179 Paul Michell et al, *The Uncertain Duty of the Expert Witness*, 42 *Alberta L. Rev.* 635, 640(2005).

180 See Gary N. McAbee, *Improper Expert Medical Testimony: Existing and Proposed Mechanisms of Oversight*, 19 *J. Legal Med.* 257, 258-59(1998).

181 *Wrobleski v. de Lara*, 708 A.2d 1086 at 1092 (Md. Ct. Spec. App. 1998), *aff'd* 727 A.2d 930 (Md. 1999).

182 See *supra* note 14.

183 *Expert Witnesses Found Credible by Most Jurors*, *NAT'L L.J.*, Feb. 22, 1993, at S4.

There are several apparent reasons for expert bias. First of all, experts are paid for their testimony. As has been pointed out previously, ordinary witnesses are regarded as unbiased court servants, while expert witnesses testify in the court for the purpose of earning money. As businessmen, expert witnesses are susceptible to pressure to satisfy the demands of those who pay them. Cynicism about the fact that expert witnesses are paid is widespread.¹⁸⁴ Another reason for expert bias is that experts are chosen by the parties rather than the court. Obviously the parties seek experts to support their case rather than to find the truth. So they choose supportive experts rather than honest experts. It is not uncommon that a party may knowingly select an expert because the expert has a relationship with the party or counsel, either as a friend, relative, employee or the like.¹⁸⁵

Speaking essentially, the adversarial system creates this problem. Unlike Germany and other civil law countries, which stress judicial control over the fact-finding process,¹⁸⁶ American law uses adversarial system. This system is one that pits two contestants or more precisely, their representatives - against each other to argue their cases before a neutral and largely passive judge. The parties control the investigation and presentation of evidence and argument.¹⁸⁷ The adversarial system encourages the parties to gather facts and persuade judges or jurors that their presentation is adoptable. The court plays only a passive role. There is much discussion and debate about the

184 See Paul Mitchell et al, *supra* note 168, at 637.

185 *Id.* At 643.

186 See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev 823 ,825(1985).

187 Nancy Amoury Combs, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 Cal. L. Rev. 663, 683 (1994).

advantages and disadvantages of the adversarial system. For example, the former Dean of Northwestern School of Law John Henry Wigmore, characterized the adversarial cross-examination as beyond any doubt the greatest legal engine ever invented for the discovery of truth."¹⁸⁸ Other scholars have charged that the American legal process provides numerous opportunities for various actors to distort the truth.¹⁸⁹ Additionally, postmodern critics of the adversarial system charge that the outcome in an adversarial setting depends too much on the relative economic resources of the parties.¹⁹⁰ The expert witness system is a small part of procedural rule. Under this adversarial system the parties have the right, and even are encouraged, to hire their own experts. Naturally the parties are not interested in finding the best scientist, but the best witness.¹⁹¹ Experts are motivated by money to support their clients. Under this adversarial system the court most often has a passive role, relying to a large extent on expert witnesses to find the truth to a large extent. Given this reliance, the expert witness should be objective and neutral. This conflict makes expert bias a big problem.

¹⁸⁸ 5 Wigmore on Evidence § 1367, at 32 (Chadbourn rev., Little Brown, 1974).

¹⁸⁹ Carrie Menkel-Meadow, The Trouble With the Adversary System in a Postmodern, multicultural World, 38 Wm. & Mary L. Rev. 5, 21-22 (1996).

¹⁹⁰ See, e.g., Marc Galanter, Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95,102 (1974).

¹⁹¹ John B. Molinari, The role of the expert witness, 9 Forum 789, 791 (1973/1974).

B. Existing Measures to Control Bias

1. The Market Mechanism

The need for expert witnesses forms a market. This market is similar in fundamental aspects to conventional markets. The adjustments in this market are swift. Experts compete with each other. Money and resources are used to influence a “sale.”¹⁹² By the market mechanism, Judge Posner means that since many expert witnesses are repeat players, they have a financial interest in preserving a reputation for being honest and competent.¹⁹³ Judge Posner also suggests that even professors acting as experts will be motivated to be honest because exposure of dishonesty to their academic colleagues would result in heavy nonpecuniary costs.¹⁹⁴

However, some scholars criticize his analysis.¹⁹⁵ In the market for expert testimony, experts aim to provide what the market demands, just like all other salesmen. What the attorneys demand from expert witnesses is not honesty, but usefulness, or effectiveness. This is the weakness in Judge Posner’s analysis. Attorneys seek a great story teller, not an impartial scientist who can help to find the truth. To be repeat players, experts must cater to their employers. In this situation, if facts are consistent with experts’ theory, experts will choose to be honest; if not, experts who want to remain

192 See Jeffrey L. Harrison, Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses, 18 Yale J. on Reg. 253,273(2001).

193 Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477 (1999).

194 Id.

195 See Jeffrey L. Harrison, *supra* note 181.

marketable may not be completely truthful. As for academic witnesses, Professor Gross maintains that, what an expert says in court is generally invisible and inaudible in her own professional world.¹⁹⁶ In a word, the market mechanism does not provide a sufficiently strong incentive to control bias.

2. Cross-examination

Cross-examination is considered by some courts to be the principal safeguard against errant expert testimony.¹⁹⁷ Using cross-examination in this way relies on the adversarial system itself, namely the opposing counsel, to control experts. In cross-examining a witness, lawyers usually reexamine the witness' testimony on direct, seeking either to get the witness to admit that he made a mistake or to frame an issue for rebuttal testimony.¹⁹⁸ The lawyer exercises tight control over this process by asking leading questions to which he knows the answers.¹⁹⁹ Issues which are within the permissible scope of cross-examination, which ultimately is decided by the court, may include interest, bias, or financial interest in the litigation.

¹⁹⁶ Samuel R. Gross, *Expert Evidence*, 1991 *Wis. L. Rev.* 1113 (1991).

¹⁹⁷ See, e.g., *Sears*, 466 N.E.2d at 212 (holding that it was an abuse of discretion for the trial judge to refuse to permit defense counsel to cross-examine the plaintiff's medical expert regarding the number of patient referrals from plaintiff's lawyer).

¹⁹⁸ See Gross, *supra* note 185, at 1115.

¹⁹⁹ *Id.* At 1116.

However, the effectiveness of cross-examination is suspect. In Harre v. A.H. Robins Co.,²⁰⁰ the court reasoned that the failure to discover perjury of an expert witness on cross-examination was not a bar to a motion for a new trial.²⁰¹ The court recognized that counsel for the plaintiff had no discovery information on the studies that were the subject of Dr. Keith's testimony and therefore focused his cross-examination on the medical literature and the plaintiff's medical records. Realistically, plaintiff's counsel expected that Dr. Keith would testify consistently with his testimony on direct examination, and it would not have been in the plaintiff's best interest to emphasize such testimony on cross-examination as a matter of trial strategy and common sense.²⁰² Compared with ordinary witnesses, expert witnesses have "greater experience and preparation."²⁰³ Therefore they are skilled in dealing with cross-examination. Particularly when the knowledge of expert testimony is beyond the lay lawyer, it is hard for the lawyer to do an effective cross-examination. So usually when an expert chooses to "falsify data, facts, and tests and then testifies, using the data to form the foundation of his opinion, searching cross-examination may not yield any result other than to provide an opportunity for such a venal expert witness to repeat his already damaging testimony on cross-examination."²⁰⁴

200 Harre v. A.H. Robins Co. 750 F.2d 1501 (11th Cir. 1985).

201 *Id.* At 1505.

202 *Id.*

203 See La. Code Evid. art. 611(C).

204 See McDowell, *supra* note 165, at 253.

3. Perjury

According to traditional common law rules, witnesses are required to give an oath before testifying. “The oath focuses the expert's attention on his or her obligation to tell the truth and the solemnity of the task. It also provides the basis for prosecution for perjury should the expert violate the oath.”²⁰⁵ This rule was established more than two centuries ago by Lord Mansfield in Folkes v. Chadd.²⁰⁶ Theoretically speaking, the perjury rule should be applied to expert witnesses the same as it is to ordinary witnesses. Although theoretically it is possible to prosecute a biased expert witness for perjury, in the real world it is very difficult, if not impossible, for the expert to be tried for or convicted of perjury.²⁰⁷ The Illinois Supreme Court noted that it is virtually impossible to prosecute an expert witness for perjury.²⁰⁸ It is uncommon to prosecute witnesses in civil suits. For expert witnesses, because they testify to ideas, concepts, scientific facts, tests, experiments, and in the form of opinion, it is even harder to establish their perjury. The threat of perjury would be a great disincentive for experts to be witnesses. So this mechanism is actually ineffective.

205 See Paul Mitchell et al, *supra* note 168, at 646.

206 Folkes v. Chadd, 99 F.R. 589 (K.B. 1782).

207 *Id.*

208 Sears v. Rutishauser, 466 N.E.2d 210, 212 (Ill. 1984).

C. Proposals for Reform

The existing mechanisms fail to effectively check expert partisanship. To control bias, some more useful devices are necessary. In the proposals which have been suggested, three are important. The first is changing from a system of party-hired experts to court-appointed ones. The second is the judicial fine, where the court punishes dishonest expert testimony. The third is using professional discipline to punish dishonest experts. The rest of this article will examine the merits and flaws of each proposal. However, it has to be pointed out first that since each proposal is novel and untested, the discussion is largely speculative.

1. The Judicial Fine

Under the Daubert test, the court examines expert testimony by criteria such as testing, peer review and publication, error rate and acceptance.²⁰⁹ Expert dishonesty is not an issue expressly required to examine by Daubert test. This embodies the passive reaction of the courts to biased experts. Although the courts may “discount or refuse to admit evidence given by experts who are partial or lack independence”,²¹⁰ this mechanism does not control bias, but instead reveals bias. It is a

²⁰⁹ Daubert v. Merrell-Dow Pharm., Inc., 509 U.S. 590 (1993).

²¹⁰ See supra note 168, at 637.

remedy, not prevention. Even if the courts happen to find the bias, the costs of parties and courts have been wasted.

To react to the bias actively, the courts should scrutinize the expert's character as well as his competency. When examining the expert's competency, the courts can rely on the Daubert test as a guide. But what guides the court in examining the expert's character? Harrison pointed out, "in practice, judicial commentary on character can be sharply personal or simply lay bare a methodology that is obviously biased."²¹¹ Some cases have described this faulty methodology. In re Aluminum Phosphide Antitrust Litigation²¹², the methodology employed by the expert to calculate damages was a generally accepted before and after approach.²¹³ In this approach, prices charged during the period of the violation are compared with those charged during a period before or after the violation. The difference between these two prices is a rough estimate of the damage to the victims.²¹⁴ In this case, the expert chose a five-year period during the violation and a one-year period after the conspiracy for the normative period.²¹⁵ The court noted that the expert had declined to use data from the period before the conspiracy and that, if he had done so, the damages would have been less. In addition, the expert selected a normative period that was evidently the period for which prices were lowest, thereby increasing damages.²¹⁶ Finally, according to the court, the expert had not considered some

²¹¹ See Harrison, supra note 10, at 274.

²¹² 893 F. Supp. 1497 (D. Kan. 1995).

²¹³ Id. At 1500.

²¹⁴ Id. At 1503-1505.

²¹⁵ Id. At 1506-1507.

²¹⁶ Id.

factors that could account for the lower prices. The court concluded that the analysis [was] driven by a desire to enhance the measure of plaintiffs' damages even at the expense of well-accepted scientific principles and methodology.²¹⁷

Courts should make public the identities of experts found to be dishonest. A reasonable lawyer will not hire an expert who has had his character questioned. In this way, the market will work to discourage dishonest expert testimony. If experts want to be repeat players, they will not take the risk of giving biased testimony.

2. Professional Regulation

Some professional associations regulate biased expert witnesses by professional discipline. For example, the Australian Council of Professions published a policy statement in 1998 setting out the role and duties of an expert witness.²¹⁸ In America, delegates to the 1999 American Medical Association Annual Meeting have already proposed a form of accountability for expert witness testimony. The delegates resolved that expert testimony is open to peer review and, if particularly egregious, disciplinary action.²¹⁹ In addition, the American Association of Neurological Surgeons (AANS) has enacted Expert Witness Guidelines and publishes a quarterly bulletin that includes a

217 Id.

218 Australian Council of Professions, *Role and Duties of an Expert Witness in Litigation* (May 25th, 1998),

www.professions.com.au/rdewl.html.

219 See David J. Damiani, *supra* note 16, at 536.

section on the infractions of the professional conduct.²²⁰ According to W. Ben Blackett, the most specific complaints investigated by the Professional Conduct Committee over the many years when he has been a member, fall into three categories: (1) expertise (knowledge of the subject matter of the testimony); (2) range of the standard of care; and (3) advocacy by the expert medical witness (prohibited by the AANS Expert Witness Guidelines), rather than educating the trial of fact.²²¹ The disposition of cases brought before the Committee is as follows: 25% or more are dismissed for failure to state a cause of action under the rules and regulations of the organization or for lack of merit; 12% result in letters of admonition or warning (not a formal sanction); 35% result in a letter of censure to the defendant; 25% result in six month suspensions; and 5% result in revocation of membership.²²²

Although these professional associations contribute significantly to the control of biased experts, they can not take the place of the courts. First of all, not all professional organizations have established expert witness codes. Secondly, not all expert witnesses are members of professional organizations and subject to professional discipline. Additionally, some professional discipline is not mandatory. So professional regulation remains a supplement to the judicial fine rather than a substitute for it.

220 See American Association of Neurological Surgeons, Code of Ethics § V. Item B (adopted 1981) (Expert Witness Guidelines, 16A-1 through 4, adopted by the AANS Board of Directors in 1983 & Position Statement on Testimony in Professional Liability Cases, adopted in 1987).

221 Id.

222 Id.

3. Court-appointed Experts

Strictly speaking, the suggestion that experts should be appointed by courts is not a proposal, since it actually has a long history in common law. Early in the eighteenth century when juries were self-informing and did not hear testimony, expertise was “factored into their decisions by including experts on the jury or bringing them in to consult with the court”.²²³ At that time, experts were considered as a member of the jury or an advisor to the judge.²²⁴ However, as the adversarial system was established and judges came to play a passive role in which they relied on the parties to present testimony, court-appointed experts were replaced by party-hired experts.²²⁵

The modern system of court-appointed experts is a response to the shortcomings inherent in the concept of the party expert witness. Under the adversarial system, the parties always hire favorable experts, which is a main reason for experts’ bias. The most logical way of solving this problem, the best in is changing partisan selection to appointment by the court. The majority of proposals to control bias involve using neutral or court-appointed experts.²²⁶ In the medical field, this reform received support from both doctors and lawyers, but some other lawyers opposed this idea because they saw it as a departure from the adversarial system.²²⁷ Because of this disagreement, reform

223 Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 41-43 (1901).

224 See Stephan Landsman, Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony, 13 Behav. Sci. & L. 131, 135 (1995).

225 Id. At 135-142.

226 See Samuel R. Gross, supra note 185, at 1188.

227 Ellen E. Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, 77 Or. L. Rev. 59, at 73-4(1998).

proceeded gradually. The 1920 case of *Ex Parte Peterson* recognized the power of courts to appoint auditors.²²⁸ In 1937, the Uniform Expert Testimony Act was passed which authorized courts to appoint experts on their own motion or at the request of a party while preserving the ability of parties to call their own expert witnesses.²²⁹ In 1946, Rule 28 of the Federal Rules of Criminal Procedure established the federal courts' authority to appoint and compensate experts in criminal cases,²³⁰ but a proposal to enact a similar rule for federal civil cases was rejected in 1953.²³¹ It was not until 1975 that FRE 706 explicitly articulated the power of the federal courts to appoint experts in civil cases.²³²

The use of court-appointed experts may reduce the bias to some extent, but the rule still has problems. The first problem is its efficiency. Under FRE 706 the courts have broad discretion to appoint their own expert witnesses without the consent from the parties. However, in practice appointments under FRE 706 are rare.²³³ A survey by the Federal Judicial Center in 1994 indicated that among the 431 judges polled, 86% have appointed only one expert witness in their career.²³⁴ Although the courts have discretion to appoint expert witnesses on their own, the courts do not have

228 253 U.S. 300, 312 (1920).

229 See John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* 563, at 650 (3d ed. 1940).

230 See 7 *Drafting History of the Federal Rules of Criminal Procedure*, 21 U.S.C. 848(q)(9) (Supp. II 1996)

231 Report of the Judicial Conference of the United States 23 (1953).

232 Ellen E. Deason, *supra* note 216, at 74.

233 See Gross, *supra* note 185, at 1190.

234 See Daniel McGinn & Karen Springen with Keara Ketchum, *Disorder in the Court*, *Newsweek*, July 20, 1998, at 53

the same time, resources or incentives as the parties to enable them to choose appropriately.²³⁵ One judge stated that appointing experts conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor. Courts may also lack confidence in their ability to choose an appropriate expert, and the class of experts the courts must choose from may not accurately reflect the field.²³⁶

FRE 706 changed the rule of selection, but it could not change the whole adversarial culture behind it. Accustomed to the tradition of the adversarial system, judges get used to playing a passive role in the trial. Although FRE 706 has given them discretion to choose experts, they do not have the same passion and interest in selecting competent experts as the parties do. The law just gave them rights, not incentives. That is why judges make appointments rarely. With this in mind, it is obvious that reform can not just focus on one aspect of the system. However, meaningful reform may change the fundamental features of the whole adversarial system. Because of its inherent conflict with the adversarial legal system, the concept of court-appointed experts is doomed to be ineffective.

The second concern is that a system of court-appointed experts may cause judges to rely more heavily on the experts. Judges might put more faith in the experts they have selected. This attitude

²³⁵ See e.g. M.N. Howard, *The Neutral Expert: a plausible threat to justice* (1991) *Crim. L. Rev.* 98 at 103;

²³⁶ See Paul Michell et al, *supra* note 168, at 649.

may cause them to use the Daubert test in a more relaxed manner. For these reasons, courts' appointments are supplementary to rather than substitute to party selection.

CHAPTER FIVE CONCLUSION

The necessity of expert testimony in medical malpractice cases is beyond doubt. The standard of care and causation present complex scientific issues beyond jurors' knowledge. To establish negligence by physicians, experts are necessary.

The necessity often results in overstatement. The swarming of experts into courtrooms generates some problems. Three main issues are raised in this article. (1) How should courts exclude incapable experts? (2) How should courts regulate negligent and reckless experts? (3) How should courts control biased experts?

Although every state has its power to give different answers to these questions, this article is trying to make analysis based on legal principles. These three questions are actually puzzles regarding the issue of expert witnesses. For the first one, it is hard for lay jurors to tell good science from junk science. In the context of medicine, it is even harder because the dispute arose from medical malpractice is not only scientific but also uncertain. Even if there is a definitive answer in science, medical practitioners often disagree "widely and wildly."²³⁷ The suggestion of this article is to rely on the standards of expert qualification and admitting expert testimony. For the second one, this article distinguishes expert witnesses from lay witnesses, and concludes witness immunity should not be extended to a friendly expert witness. Thus negligent experts should be regulated by

²³⁷ James C. Mohr, *Doctors and the Law* 96, (1993).

professional responsibility. For the third one, the bias of experts is inherent in the adversarial system.

This article gives some proposals to control it, but it is almost impossible to get rid of it.

All these measures and proposals seem to take the opposite side of experts. Actually this article is not aiming to put such a great pressure on experts that discourages them to be witnesses. All efforts are seeking a balance between the legal community and the medical community although the concept of “perfect” justice in legal system is impossible to achieve.

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