Suing Friendly Experts

Witness Immunity in the Post-*Daubert* World

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Making a case for treatment similar to that of judges, jurors and other court personnel.

Traditionally, witnesses who testify in a legal proceeding enjoy complete immunity from claims arising out of their testimony. *See generally* W. Page Keaton *et al.*, Prosser and Keaton on the Law of Torts §114, at 817 (5th ed. 1984). The same protections are extended to judges and other court personnel. *See generally Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (prosecutors); *Wilson v. Sullivan*, 81 Ga. 238, 7 S.E. 274 (1888) (judges). The public policy reasons for this rule are obvious—witnesses should be encouraged to participate in the legal process and should be undaunted by the fear of claims or lawsuits arising out of their testimony.

Unfortunately, witness immunity principles have not always protected expert witnesses from such claims, even though a variety of procedural mechanisms exist to ensure fairness to all participants in a judicial proceeding. This article will consider various aspects of such claims. It will begin by examining the effects of *Daubert* on the availability of expert witness testimony and will cover the leading cases articulating the immunity to which expert witnesses are entitled. Then, the article will examine a phenomenon related to the dramatic expansion in the availability of expert evidence—claims for negligence of breach of contract (or both) brought by disgruntled litigants against their own retained experts. The article will discuss some of the theories advanced in these claims, as well as some of the available defenses and how best to assert them on behalf of the expert. The article concludes with a recommendation that expert witnesses should be immunized from such lawsuits in the same way that judges, jurors, and court personnel are immunized.

Daubert and its Effects on Expert Witness Testimony

As the Advisory Committee's Note to the applicable Federal Rule of Evidence explains, "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702, advisory committee note. Because of the increase in exper-

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tise and specialization in so many fields, expert witnesses are increasingly called upon to clarify, explain, and assist on many important issues. There can be little doubt that the significance of expert witness testimony in civil litigation has dramatically increased in the nearly 15 years since the Supreme Court of the United States opinion in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

In *Daubert*, Justice Blackmun's majority opinion overruled the district court's having excluded expert evidence in a product liability case, an order that had been affirmed by the court of appeals. Prior to *Daubert*, expert witness testimony had been analyzed under the cryptic but familiar "generally accepted" standard articulated 60 years previously in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Daubert* decision changed all of that by adopting a more flexible inquiry that was rooted in the Federal Rules of Evidence and focused on the reliability and validity of the scientific evidence. By abandoning the "generally accepted" test in favor of the more flexible "reliability" test, the Supreme Court loosened the previous restrictions articulated in the *Frye* case. While asserting that trial judges were to act as "gatekeepers," who must consider the reliability of expert testimony so as to keep "junk science" away from fact-finders, the Supreme Court actually worked an expansion in the scope and admissibility of expert testimony. The Court listed several factors that a trial judge might consider when determining whether a theory or methodology is scientifically sound including whether it can be (and has been) tested, whether it has been subjected to peer review and publication, and whether it is "generally accepted" in the scientific community. *Daubert*, 516 U.S. at 591–96.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court again stressed that the reliability test is "flexible" and held that the *Daubert* "gatekeeping" obligation applies to all expert testimony, including testimony based on "technical" or "other specialized knowledge."

In the aftermath of *Daubert*, virtually every civil lawsuit features at least one expert playing a significant role on liability, damages, or frequently both. As one court observed, *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). One prominent study concluded that although the *Daubert* decision has resulted in increased scrutiny of expert evidence by trial judges and a corresponding increase in instances where expert evidence is excluded, it is unclear whether this has led to more reliable evidence as a general rule. *See* Lloyd Dixon & Brian Gill, RAND Institute for Civil Justice, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the *Daubert* Decision, 61 (2002).

Daubert, *Kumho Tire*, and the cases that have followed have emphasized that the dangers associated with admitting untested or unscientific expert testimony into evidence are best addressed by cross-examination and the presentation of contrary evidence. The end result of all of this is that the role of expert witnesses in civil cases, and the correspondingly increased expectations on the part of litigants as to what experts can and should do, has increased. In virtually all lawsuits, the litigation fortunes of a client rise or fall with the viability of his or her experts' opinions and their success in front of the judge or jury.

The Traditional Role of Witness Immunity: The Pre-*Daubert* Landscape

The Supreme Court articulated the salutary benefits of the principle of witness immunity in *Briscoe v. LaHue*, 460 U.S. 325 (1983). There, the Court addressed two separate appeals that raised the question of whether witnesses are absolutely immune from liability to adverse parties on the basis of their trial testimony. The Court held that immunity is defined by the function of the individual as a witness in the judicial proceeding. *Id.* The Court reasoned that witnesses might be reluctant to come forward to testify, or might shade their testimony, if they could be liable for their testimony. The Court noted that immunity is needed so that judges, advocates, and witnesses could perform their functions without fear of harassment or intimidation. *Id.*

There are two significant appellate court decisions pre-dating *Daubert* that specifically discuss the concept of friendly expert witness liability. *Levine v. Wiss and Co.*, 97 N.J. 242, 478 A.2d 397 (1984), involved negligence claims by an unhappy divorce litigant against the accounting firm retained by both parties to value the husband's interest in a closely held corporation. The couple agreed that the opinion of the firm would be binding, and, after receiving the firm's report, the couple reached a pretrial settlement. Thereafter, both parties had changes of heart and unsuccessfully moved to vacate the settlement. The husband then sued the accounting firm for negligence and alleged that the firm's negligence in valuing his interest caused him to settle the case on unfavorable terms. *Id.* at 245–46.

In one of the earliest and most comprehensive decisions involving witness immunity as applied to an expert, the Supreme Court of New Jersey refused to apply it to absolve the accounting firm of liability. *Id.* at 246. The court declined to hold that the firm had effectively acted as an arbitrator so as to be shielded from civil liability. Rather, the court pointed to the husband's reasonable expectations that the firm would apply reasonably competent accounting skills. *Id.* at 248. Although the court recognized that arbitrators, like judges, are generally afforded immunity, the court refused to extend liability to shield experts performing limited professional services that involved neither testimony nor the exercise of judicial discretion. Importantly, the court distinguished between the accounting firm's "appraisal" function and its having acted as a type of arbitrator. *Id.* at 248–49. The opinion suggests that the court might have applied witness immunity to protect the firm had its activities been in the latter category.

Five years later, the Supreme Court of Washington decided the seminal case of *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wash. 2d 123, 776 P.2d 666 (1989). In a sharply divided opinion, the court held that the doctrine of witness immunity barred an unhappy litigant from suing his retained engineering expert. The majority reasoned that the policies behind the immunity doctrine, including the encouragement of objective trial testimony, militated in favor of applying the doctrine. The court rejected the proposition that witness immunity applied only to defamation claims. Finally, the court

rejected the notion that a privately retained expert was not entitled to immunity by virtue of his status. In the court's words:

> The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which judicial immunity rests.

The immunity to which an expert witness is entitled applies to the "whole, integral enterprise" of preparing and testifying.

Id. at 669. The court went on to say that the immunity to which an expert witness is entitled applies to the "whole, integral enterprise" of preparing and testifying, *id.* at 672, and that "absolute immunity extends to acts and statements of experts which arise in the course of or preliminary to judicial proceedings." *Id.* at 673. The court concluded that the protections afforded litigants who retain experts—the oath to testify truthfully, the rigor of cross-examination, and the threat of a perjury charge—were all to which the litigants were entitled. *Id.* at 669–70, 673.

The Erosion of Witness Immunity and the Post-*Daubert* Landscape.

The *Bruce* court's reasoning has been followed in only one other case, *Panitz v. Behrand*, 632 A.2d 652 (Pa. 1993), which was decided a few months after *Daubert*. *Panitz*, in turn, was overruled in 1999 by *LLMD of Michigan, Inc. v. Jackson Coors Co.*, 740 A.2d 86 (Pa. 1999), so *Bruce* is the only currently viable opinion applying the doctrine of witness immunity to claims against experts.

A number of other opinions since *Bruce* have declined to follow it and expressly ruled out applying witness immunity to claims against friendly experts. *Mattco Forge v. Arthur Young, Co.*, 52 Cal. App. 4th 820 (1997); *Murphy v. A.A. Mathews*, 841 S.W.2d. 671 (Mo. 1992); *Boyes-Bogie v. Horvitz*, 14 Mass. L. Rep. 208 (Mass. Super. 2001). A detailed discussion of each of these opinions is beyond the scope of this article. Although each opinion is carefully crafted, each fails to come to grips with the necessity of protecting expert witnesses as recognized by the *Bruce* court.

Suing Friendly Experts

Causes of Action against Expert Witnesses

While it appears that claims against friendly experts will be more common as the post-*Daubert* world develops, there is a surprising lack of authority in the area. There are only a handful of reported decisions, as noted earlier in this article. However, a review of available law, and this writer's experience in handling the defense of one such case, permits some general comments.

The most common claim asserted by the disgruntled litigant is for simple professional negligence, and the trend appears to be to model these claims after those asserted against professionals such as doctors, lawyers, or accountants. In any such claims, the plaintiff must prove (1) that the professional breached a duty owed, and (2) the breach of that duty was the cause in fact and the proximate cause of some actual loss or damage. *See* Prosser and Keaton on the Law of Torts §30(5th ed. 1984). The mere breach of a professional duty does not create a cause of action unless the plaintiff can show that he or she has been harmed thereby.

With respect to expert witness testimony and subsequent liability, causation may be the most difficult element to prove. This is particularly true if several experts offered opinions or if the evidence presented required a subjective evaluation by the expert.

A second cause of action may be asserted for breach of contract. Resourceful plaintiffs may assert breach of contract claims in order to evade traditional negligence defenses such as statutes of limitation or contributory or comparative negligence. Obviously, this will turn on whether there was a meeting of the minds between these parties as to the scope of the expert's engagement. Any writings evidencing this arrangement must be carefully scrutinized.

Finally, there may be claims asserted under various consumer protection-type statutes that are frequently resorted to in professional negligence situations. These claims may be rooted either in an alleged violation of professional standards or in an alleged misrepresentation by the expert as to his or her qualifications.

Defending an Expert Accused of Negligence

In order to fashion a defense, counsel for the expert witness must do a couple of important significant things at the outset. First, counsel must size up precisely what the expert's mandate was in order to make a judgment as to what his or her legal duty, if any, was. Was the expert hired by the attorney, as opposed to the client? Was the expert hired only to assist counsel as to one feature of the case? Was the expert retained to advise the litigant as to settlement alternatives? Or, was the expert hired to come to court to give sworn testimony? Was there a writing between the litigant and the expert confirming the scope of the engagement? Was the expert appointed by the court rather than retained? The answer to these questions can have significant bearing on defense efforts.

Once this has been accomplished, the second area of analysis relates to precisely what transpired in the underlying case. Was the expert's opinion ever formulated or disclosed? Was it subjected to a *Daubert* challenge? Did the expert actually render it in court? What was there about the result in the underlying case that the client found unsatisfactory?

Another important aspect to ascertain is whether the complained-of work relates to pretrial work. The Washington Supreme Court opinion in *Bruce* extended witness immunity to all expert functions associated with litigation. The court noted that, "Any other rule would be unrealistically narrow and would not reflect the realities of litigation and would undermine the gains in forthrightness on which the rule of witness immunity rests." *Bruce* at 673. Conversely, in *Murphy v. A.A. Matthews*, the court held that "witness immunity does not bar suit if the professional is negligent in providing the agreed [litigation] services." *Murphy* at 672. The *Murphy* court

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held that witness immunity did not apply when the experts were privately retained to provide litigation support. *Id.* at 680. *See also Mattco Forge v. Arthur Young*, 52 Cal. App. 4th 820 (1997), where the court held specifically that the immunity "does not protect one's own witnesses."

A related area of inquiry relates to whether the expert might have an indemnity or contribution action to assert. The most obvious source of such a claim is the lawyer or law firm who hired the expert. *See generally Forensis Group, Inc. v. Frantz Townsend & Foldenauer*, 130 Cal. App. 4th 14 (2005); *Krantz v. Tiger*, 390 N.J. Super. 135 (App. Div. 2007). Once again, the precise nature of what transpired in the underlying case will be of great assistance in this regard.

Given the discouraging trend in the witness immunity context, what other defenses can be raised? In addition to the standard causation and standard of care defenses, serious consideration in every expert witness claim should be given to the economic loss rule. That rule, which has been adopted in one form or another in nearly every state, prohibits the recovery of "mere economic losses" in negligence actions unless there has been personal injury or damage to property. *See* Fowler V. Harper *et al.*, The Law of Torts §25.18A (2nd ed. 1986, regular updates). As Judge Benjamin Cardozo put it, the economic loss doctrine prevents "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931). *See also Aldrich v. ADD, Inc.*, 437 Mass. 213 (2002); *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393 (1993).

Although the economic loss rule is not discussed in any of the published opinions involving suits against friendly experts, it may provide a formidable legal defense. In most situations, the alleged harm has not been accompanied by property damage or personal injuries. The more difficult question arises in jurisdictions where the economic loss rule is deemed not applicable and the plaintiff alleges the existence of a fiduciary duty. *See Clark v. Rowe*, 428 Mass. 339 (1998).

The Case for Witness Immunity

As can easily be seen by the foregoing discussion, claims against friendly expert witnesses raise a host of difficult issues for the defense practitioner. Although there does not appear to have been a dramatic increase in these cases post-*Daubert*, it is not difficult to imagine an increase in the future. This potential "new generation" of claims can be nipped in the bud by expanding the well-reasoned majority opinion in *Bruce* and in holding that all expert witnesses are immunized from claims for negligence or breach of contract. In no particular order of importance, here are some policy reasons why this should happen.

- Expert witnesses are friends of the court who assist lay jurors in understanding scientific, technical, or other specialized knowledge. Because of the expertise and specialization in so many fields, expert witnesses are often needed to clarify, explain, and assist on many important issues. The judicial system needs this assistance and should protect those who provide it.
- Expert witnesses are, in effect, officers of the court who are granted the special privilege of offering opinion evidence as to contested matters. Accordingly, they should be entitled to the same protections as judges and court personnel.
- Expert witnesses should be encouraged to be free with their opinions and not be shy about expressing them. Allowing them to be sued in the event that their opinions are rejected by a "gatekeeper" or a fact-finder discourages such activity.
- Knowing that expert witness testimony is subject to *Daubert* scrutiny creates a disincentive for experts to venture too far from accepted methodologies. A litigant who is unhappy with an exclusionary ruling or an adverse result should not be permitted to blame his or her retained expert.
- Permitting suits against friendly experts will discourage all but full-time experts from becoming involved in the judicial system. This is not good for the system.
- In jurisdictions where the economic loss rule applies to claims against experts, an unhappy litigant should not be permitted to argue that his or her expert owed a fiduciary duty. The proposition that an expert can ever be considered a fiduciary raises troubling issues as to credibility and objectivity.
- Experts should be encouraged to develop new theories and express them. Permitting lawsuits against them discourages this activity.
- Experts are frequently subject to codes of professional conduct and may face sanctions for offering unfounded or otherwise inappropriate opinions. These sanctions are sufficient to deter improper overreaching, and the existence of civil liability will add nothing to this deterrence.
- The law's interest in insuring finality is undermined by permitting suits against expert witnesses. These suits can perpetuate a cycle of litigiousness that the law disfavors.

Expert witnesses assist the court and the jury in understanding complex issues and provide a basis for decisions that would otherwise be based on ignorance or conjecture. The immunity doctrine was designed to permit the free flow of information on the witness stand without fear of retaliatory lawsuits. The best way to follow the Supreme Court's directive in the *Daubert*/*Kumho* line of cases and to expand the universe of permitted expert testimony is to protect experts from civil liability arising from their work. FD