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# EXPERT EVIDENCE: THE GATEKEEPER ROLE OF JUSTICE

*Victor E. Schwartz\**

In criminal law, if a person is convicted of something he or she did not do, it would rightfully be condemned as an injustice. While it does not have the same moral impact, it is just as “wrong” and representative of injustice when a person or entity in a civil case is subject to liability for something it did not do. This situation is not the shades of gray that permeate many aspects of tort law; this injustice is the basic fact that the defendant did not cause the plaintiff’s alleged harm.

Unfortunately, this type of injustice has invaded our legal system. I wrote about the issue in 2006,<sup>1</sup> and since that time, the situation of holding a defendant subject to liability for a harm it did not cause appears to have worsened. The reasons might be explained by the understandable sympathy of some judges and juries for a seriously ill plaintiff or a plaintiff who has lost a loved one. It can also be explained by the phenomenon of “deep pocket jurisprudence®,”<sup>2</sup> where the actual wrongdoer lacks the funds to pay the plaintiff or is unavailable for suit, so another party with far greater assets is held liable instead. The misuse of expert evidence can facilitate these injustices. The same injustice can adversely affect the rights of an injured plaintiff if a judge permits the testimony of a defense expert whose opinion is not based on sound science. There is some hope, though, that the age-old sin of blaming Peter for the sins of Paul through overly permissive gateways for experts to testify may be tightening as amendments to clarify the application of Federal Rule of Evidence 702, which deals with the admissibility of expert evidence,<sup>3</sup> took effect December 1, 2023.

## A. WHY JURIES CONSIDER EXPERT EVIDENCE

A basic function of juries is to find the facts of a case. Juries perform this function, in part, by determining the credibility of layperson witnesses. They are aided in this determination by the witness’s testimony and cross-examination. Suppose that a pedestrian claims he was hit by a car because a driver was careless. A key fact of the case is whether the streetlight was red, yellow, or green when the pedestrian crossed the street. Based on their lived experiences, layperson jurors are equipped to make that determination.

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1. See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217 (2006).

2. See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359 (2018).

3. See FED. R. EVID. 702.

But what if the factual determination is beyond the jury's abilities? For example, if the case was against the manufacturer of the car that hit the plaintiff, and the plaintiff claims there was newly available technology that could have stopped the car in time to avoid injury. Suppose there is a case in which medical science is paramount. A plaintiff claims he or she suffered heart failure because of a COVID-19 vaccine.

If a factual dispute in a case is beyond the understanding of a lay juror because the juror has no frame of reference or experience to decide the issue, basic evidence law allows for the use of an expert witness to assist the jury in making such a determination. It should be noted that expert witnesses, in practical terms, are really "super witnesses." They can do things in their testimony that lay witnesses cannot do. For example, expert witnesses can render testimony based on a lecture they have heard or a book they have read, even if the person who gave the lecture or wrote the book is not in court and is not subject to cross-examination.<sup>4</sup> Experts can also testify as to conclusions, whereas lay witnesses cannot. Moreover, an expert could testify that a vaccine caused the plaintiff's injury. Expert witnesses may even testify to the ultimate legal issue in the case, for example, that a product is "defective."

Expert superpowers go beyond the subjects they can address. They may be introduced like movie stars with their vast education and accomplishments paraded before the jury. They are often presented with an aura of infallibility, which can mask the reality that they can mislead a jury to hold an innocent defendant responsible for a harm it did not cause.

#### **B. A PRIMROSE PATH OF EXPERTS MISLEADING A JURY: THE POST HOC PROPTER HOC FALLACY**

A primrose path for experts to mislead a jury is to blind them by the post hoc propter hoc fallacy. This fallacy suggests that if one event follows another, the first event must have caused the second; for instance, if a plaintiff sustained a heart ailment after being vaccinated, the vaccine caused the heart ailment. The result: an innocent defendant is held responsible for a harm it did not cause.<sup>5</sup>

#### **C. TRIAL JUDGES' "GATEKEEPER" ROLE TO SCREEN UNRELIABLE EXPERT TESTIMONY**

The legendary expert treatise writer, Professor John Henry Wigmore, posed this question over 100 years ago: How does a lay jury decide which of

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4. See generally FED. R. EVID. 703 (permitting expert witnesses to base opinions on facts or data not admitted into evidence).

5. See Victor E. Schwartz & Christopher E. Appel, *Roundup Cases May Be a New Example of an Old Problem: The Post Hoc Fallacy*, 34 LEGAL BACKGROUNDER 11 (Aug. 9, 2019) <https://www.wlf.org/2019/08/09/publishing/roundup-cases-may-be-a-new-example-of-an-old-problem-the-post-hoc-fallacy/>.

two experts is telling the truth when the jury has virtually no knowledge of the subject being considered? There is no clear, rational answer to Professor Wigmore's question. However, a key step endorsed by the United States Supreme Court three decades ago is that federal district court judges should act as "gatekeepers" to protect jurors from misleading expert testimony.<sup>6</sup> Judicial "gatekeeping" goes beyond determining whether an expert has academic qualifications. Rather, the key inquiry is whether the expert's proposed testimony about issues such as causation relies on a sound scientific methodology, which the expert reliably applies to the facts of the case before the court.

A judge's gatekeeping function and determination cannot be made in the rush of a courtroom trial. This determination can prevent an innocent defendant from being held responsible for a harm it did not cause or a plaintiff from being able to prove a legitimate case. Fortunately, many trial judges realize this fact and hold a separate hearing (outside the jury's presence). Nevertheless, some judges have declined to exercise a gatekeeping function. Why? Unfortunately, they bought into the argument that it is an overstep for judges to interfere with the jury's evaluation of expert testimony. These judges follow a more permissive approach to let the jury distinguish sound from unsound expert testimony and let cross-examination of expert witnesses ferret out the truth. This argument ignores a fundamental fact underpinning the question posed by Professor Wigmore, namely that jurors lack the ability to evaluate witnesses on subjects that, by definition, they know nothing about.

The Federal Rules Advisory Committee appreciated this difference and improved Federal Rule of Evidence 702 regarding the admissibility of expert evidence, but most tort cases land in state courts. State court judges should appreciate their much-needed role to screen out unfounded expert evidence offered to a jury.

## CONCLUSION

With verdicts in tort cases increasing in frequency and amount,<sup>7</sup> it is more important than ever that judges protect innocent defendants from being held responsible for harms they did not cause. Judges should embrace basic justice and act as gatekeepers against misleading and unreliable expert evidence.

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6. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

7. See Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: Trends, Causes, and Solutions*, U.S. CHAMBER INST. FOR LEGAL REFORM (Sept. 2022), [https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts\\_RGB\\_FINAL.pdf](https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf).