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Epstein: A New Regime for Expert Witnesses

A NEW REGIME FOR EXPERT WITNESSES

RICHARD A. EPSTEIN*

I. TORT REFORM OR PROCEDURAL REFORM

Most proposals for tort reform are efforts to mount a frontal assault against a system that many believe to be deeply at odds with the best interests of our legal social system. In the many years in which I have dealt with mass torts, both as a scholar and as a consultant, I have become convinced that the protracted struggles in litigation are a pointless social exercise that fail in all of their fundamental objectives. The sprawling nature of the litigation consumes enormous social resources, and the kinds of factual inquiries that are raised in the cases require lawyers to develop extensive expertise in a wide range of scientific, economic, and historical issues. In 1968 when I started to teach, the paradigmatic tort was still the automobile collision at the intersection of Fourth and Main, and serious scholars were asking whether the tort system had any future at all, given that automobile no-fault insurance was likely to overtake automobile liability, just as employer liability gave way to worker's compensation laws.

Those predictions have, of course, proved to be wrong. Today tort litigation is as likely to direct one to the state of medical knowledge in 1930 as it is to be concerned with events in the here and now. The collection and organization of data on so broad a front is a full time task that generates an expertise of its own. I am happy to report that lawyers are not the only ones to blame for this new found situation. They have received expert assistance throughout -- namely they have had the assistance of expert witnesses whose services in a wide array of specialties are absolutely necessary to drive any complex case from beginning to end. To be sure, experts have always been a part of tort litigation. It is impossible for any medical malpractice action to proceed without competent medical testimony, both on the standard of care and on the question of causation and extent of injuries. Modern product liability litigation brings a powerful demand for engineers and for psychologists, the first to tell us about design and the second to tell us about warnings. And in all cases economic experts are prepared to give precise indications of present and future losses in the critical damage phase of a trial. So experts are here to stay.

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But they are an expensive trinket. There are two ways in which one can attack the problem. By the first, one can try to alter the substantive rules of the game so as to reduce the complexity of the issues on which the experts are forced to testify. If one had a rule for automobile accidents that said noncompliance with the rules of the road were conclusive evidence of negligence, then there would be somewhat less running room for experts to comment on insanity and drunkenness, or to explain why this or that maneuver should have been tried by a hard-pressed driver. The question would be, who hit whom, or who had the right of way at the intersection? Similarly, if the matter is one of product liability law, it will be far easier if the expert has to testify whether the defect was latent or patent, than to testify if some alternative device was (1) technically feasible at the time the product was sold, (2) economically feasible, and (3) acceptable to consumers. The hypothetical reconstruction of the market, so routinely demanded in tort litigation, is always an arduous and uncertain task.

The resulting testimony on issues of this sort can easily conflict, given the looseness of the underlying substantive rules. Yet what is a jury to do when faced with sharp, clashing opinions of rival experts, each of whom sports excellent credentials. One obvious strategy is to split the difference between the two sides, on the view that moderation of the source of wisdom in a sea of ignorance. But whatever the short term appeals of this strategy, it is a recipe for institutional disaster. The mere fact that all experts may exaggerate does not tell us in a particular case *which* expert has in fact exaggerated. It could well be that one expert has told the truth in restrained fashion, while the expert for the other side has shamelessly overstated his case. To average out these two opinions is to award misconduct by half. While that result may be better than accepting the testimony of the wrong expert as the gospel truth, by the same token it is far inferior to accepting the testimony of the expert who has in fact told the truth. There are few strategies that will allow a suspicious jury to do the right thing in the face of its own ignorance.

II. LIMITING THE POWER OF EXPERT WITNESSES

Ideally, the proper response to many of these problems with expert evidence is to reform the substantive law. But often that path is blocked for political and practical reasons. There is, however, a second way to attack the difficulties of using expert witnesses: it is to ask what rules of procedure could serve to eliminate the two most obvious defects to the current system of rules. The first is the expense in expertise, and the second is the risk of bias and coaching.

The present legal rules do relatively little to constrain the abuses of the

system on either account. One possible area of reform, which Peter Huber¹ has addressed, is making the requirements for expert testimony more stringent, as was once required under the *Frye* rule.² The expert has to testify on the strength of a received body of wisdom and cannot engage in extrapolation from known data by way of novel theories. In essence, if there is evidence that drug X can cause cancer of the liver, it is not enough to say that where there is smoke there could also be fire. Hence, expert testimony that the drug could cause cancer of the colon as well must be rejected, unless there is some clinical study which shows that an interesting possibility is supported by some empirical data. To be sure, some cases will be dismissed because they were brought in advance of the scientific knowledge that established their validity. But by the same token, many cases will be dismissed before further study shows that the presumed connection could not be established. I think that reforms along this line are important. But there are procedural matters to take into account as well.

One major effort to deal with bias is to say that experts cannot share in the contingent fee arrangements that are charged by lawyers. The point is that their neutral evidence cannot be bought or sold for money. But the indirect inducements still remain. The expert who brings home the bacon in the first case will be likely to command a larger fee for services in the next case. The market for experts is well-developed, so that reputations can travel fast, and the expert who has done well with lawyer A is likely to be able to capitalize on that performance record with lawyer B in the next case. The rule against contingent fees (and the power of cross-examination) may curtail the obvious forms of blatant prejudice through which the jury is likely to see in any event. Nonetheless, there are a lot of cases that are close to the line, and the expert who labors with a powerful financial inducement (indirect to be sure), and a close client identification is likely, just likely, to shade his opinion in favor of his client's position. The point here has little to do with plaintiffs or defendants. With human nature what it is, we can be confident that experts on both sides of the line will be prey to this particular failing.

The problem of bias has another dimension, one which is closely linked to the expense question. Expert witnesses are in close communication with clients and lawyers from the moment that they are retained. They are coached by their lawyers as to what they can and cannot say; they rehearse the questions that they will be asked, and the answers that can be expected; they will help the lawyer to break down the expert on the other side. The coaching costs a lot of money, and it only increases the risk of bias as well. The question is what then can be done about the situation assuming that experts remain as essential to tort

1. See generally PETER HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723 (1992).

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

litigation as water is to human survival.

Consider this proposal. Each side is allowed to designate an expert, and there its involvement in the management of the case comes at an end. The power of designation (on which more later) carries with it no further rights. The side that designates the expert is not allowed to speak to its expert; the expert does not know the side that appointed him; and the materials in question are furnished through the court, coupled with instructions that the expert can make whatever additional inquiries are required, subject to a budget constraint. If there are questions about the scope of the inquiry, they are referred back to the court, where the matter can then be reviewed by counsel. The scheduling of hearings is made by the court and not through the parties. At no point does the expert know the party that has appointed him, and to pass that information on is to risk serious penalty for both expert and lawyer alike. The expert is forced to make decisions behind the veil of ignorance, and is only allowed to guess who his client is. During the course of the trial, it may become apparent who has hired the expert, but then again it might not. In this context the lawyer could well seek to undermine his own expert if the testimony presented comes in against the client's case.

The question remains, what ability do parties preserve for themselves when they retain the power of designation? Here the point is a critical one, and for two reasons. First, the proposal would be much easier to implement on a blank slate. Today there are segments of the expert witness brigade that are organized by sides. It will take, therefore, little imagination for most experts to know who has hired them for this case. It is the same people who have hired them before. The matter becomes even more obvious when the experts for each side have taken published positions on certain issues (e.g. toxicity of agent orange, or whatever), so that their public personae makes it clear the side that supports them. But even here all is not lost, for there are two possible ways to control the problem. First, the courts could adopt a rule that allows each side to veto the choice of expert from the other side on a showing of cause (there are too few experts in many areas to allow preemptory challenges on this point), which showing depends on a demonstration of close involvement with one side of the industry or another on the case. The problem here is a difficult one, to be sure, for one side may be able to knock out the other's first choice of expert while his own expert may well be able to escape condemnation. Any challenges should look therefore not only at the one expert in isolation, but at the connection between the two experts for the different ideas. This problem should in part, however, be transitional, for if the system were widely adopted, then the next generation of experts might be more clearly neutral than they are today.

The second point, however, remains. Even if the expert does have some natural affinity with the side it chooses, there is a new level of independence that

will be had, for the want of coaching should reduce the levels of the partisanship that comes into the case, and surely the expense associated with trial preparation. Any firm that wants can hire an expert to evaluate experts, which is often done in large mass tort litigation today, but that expert will not be allowed to testify at all in the basic case.

The question then arises what this reform will do to the overall operation of the litigation system. It should, of course, reduce the delays and cost in preparing a case for trial. The costs of the expert witnesses under the present system are exceedingly high, and the simplification of the rule should do something to reduce those costs substantially. After all, if the lawyer cannot coach the witness, there is less reason to invest in the entire process. But how should it influence the rate of settlement and the value of the settlement? In general, I think that the use of two independent experts in a case should reduce the variance in the assessments that are put forward to the court and the jury. The closeness of those assessments should help each side frame its own judgments as to the way the case is going. Before the experts get on the stand, I think that the likelihood of settlement should increase. After they are on the stand, it is likely that both sides will reform their estimations, but it is not likely that their reassessments will lead to a further divergence of opinion, so that the settlement rate should still become higher, even if the expected value of that settlement could shift in one direction or another in consequence of what is revealed at trial. I conclude, therefore, that the system could work if it were tried.

But what are its chances of being tried? In the short run, I think that it is most unlikely because of the widespread acceptance of the rule that each party should have total dominance over the preparation of its case. Indeed, there is no question that in individual cases, one side will value its choice of experts more than the other. Armed with that information it is unlikely that the two sides could agree to this proposal in any individual case. But in the broad run of cases, the loss of case control should not be regarded as having that skewing effect. The two parties do not know who they are, or what the particular circumstances are that surround the case. At the more general level, there could be greater sympathy for the result. But who will favor it? I suspect that lawyers might be opposed, but it is difficult to be sure. The elimination of the control over experts will reduce the cost of litigation, and surely the management and deposition fees of lawyers. But by the same token, it will make it possible, doctrine constant, to bring into the system a raft of cases that are now outside it, simply because the barrier of hiring and retaining an expert is too great. My sense, therefore, is that lawyers on the margin (i.e., without real political power) would favor this proposal, whereas lawyers and firms, much of whose expertise resides in the preparing of experts for trial, will be opposed. The increase in business, even if favorable for the profession as a

whole, may be directed toward other firms who will find it easier to enter the tort business. But it is hard to say.

Nor is it clear how experts will regard the changes. It clearly gives them less work to do per unit case, but that might be offset by an increase in the number of cases that are prepared for trial. Or, it might allow experts who now are reluctant to be tainted by the process to enter it, secure in the knowledge that their independence receives greater protection and respect. Hence there, should be a division of opinion, in which the masters under the present system are likely to be most strongly opposed to any thorough going proposed reform. The outsiders who might testify are not likely to become involved in the issue, except perhaps through the operation of their professional societies.

I suspect, therefore, that the real champions of this reform are the clients that are faced with repeated litigation over similar issues, to whom the cost of expert witnesses are truly daunting. Since these firms have a large portfolio of cases, they should be less concerned with the skewing effect in individual cases than, say, plaintiffs who know their particular circumstances. In general, all efforts at tort reform have been stymied at both the federal and state levels, and it is likely for this to happen here, for the groups that have an interest in retaining the present system appear to me to have the upper hand. In addition, I think that the extensive reforms that I have just outlined are too far-reaching for individual judges to impose case by case, and the selective imposition of the rule could have enormous consequences that are difficult to calculate. But it is perhaps possible for this to be done by the revision of the federal rules themselves, or even by Congress, insofar as the matter is one that concerns the operation of the federal court system. The problem is surely there, even if the solution is not.

Even if the reforms are not adopted in full, there may be other approaches that could be taken. One is to eliminate all discovery of all experts prior to trial. Here the discovery of experts could often prove of little social value. It may well be that the deposition will be perfunctory, as the lawyer conducting it will want to hold back the heavy barrage until trial takes place. Alternatively, if the initial attack is heavy, the expert under siege may be able to work out clever replies to the challenges that are made. The mutual removal of the right to take depositions should save costs, and should not have any bias one way or the other. It seems to be worth a try, and could be implemented by judges controlling the pace of litigation in individual cases.

A second more modest reform is one that limits the number of times that a given party can use the same expert witness. To be sure, there is a certain economy of scale in using the same expert witness in multiple cases: there is less start up cost than if a new witness has to be prepped on each occasion. But

there is the offsetting risk that the dependence between expert and client becomes too great to ignore. Requiring the clients to switch experts forces them to go to the market a second or third time, and thus breaks the stranglehold that a single expert witness is able to exert over the entire process. Switching experts between cases thus functions like a corroboration requirement, and hence as a useful check against bias.

III. A BROADER LOOK AT THE PROCEDURAL SYSTEM

The reexamination of the role of experts is long overdue, as is a reevaluation of the entire rules of civil procedure, which were passed for a simpler age of tort law. These procedural rules were adopted under the naive view that parties would regard litigation as a joint and disinterested search for the truth, instead of the all out slugfest that it has become today. The simplest way in which to state the problem is as follows. The present Federal Rules of Civil Procedure operate on two major assumptions that were wrong at the time of their adoption in 1938, and that are devastating in their consequences today. The first of these assumptions is that the parties should retain ironclad control over their side of the litigation, including of course the right to depose witnesses on the other side as a matter of course. The second of these assumptions is that the rules should be drafted in ways that forgive inexperienced parties the consequences of their errors, even if that introduces an additional element of discretion into the rules. The first of these assumptions is a carryover from the earlier system of code pleading, and the second was an effort to ameliorate harsh consequences under a commendable maxim that procedural mistakes should not be allowed to obscure the substantive merits of an individual case.

Both of these propositions contain serious errors. Regarding the first, the autonomy principle is often sufficient (even in an age of class actions) to allow the plaintiff to have exclusive control over his case and the defense over its case. But that is a very different proposition from one that says that one can have unlimited access to all the tools of the legal system in order to advance that case. In the general tort law the limitation on the autonomy principle has always been the harm principle: one cannot use one's own property in order to damage the person or property of another. Once we come to see that litigation should be understood as a form of constrained aggression, then the autonomy principle must give way to some recognition that the advancement of one side imposes heavy costs and legal obligations on the other. If you can demand deposition, if you can propound complex interrogatories, if you can ransack the other parties' files, then you can commit a form of aggression. We would never allow the police unlimited power to enter, and we should not encourage a set of rules whereby the major objective is to figure out some low cost inquiries that are exceedingly costly for the other side to respond to. There has to be a mutual nonaggression pact imposed by the state, whereby each side is

compensated by the parallel restrictions that are imposed on the other side. The question is how to maximize the net good out of litigation, that is, to find the way to maximize the difference between gains from reliable outcomes and the full costs necessary to achieve them. An unflinching respect for autonomy leads to a dual ruin situation when conflict is at stake.

The second proposition, that we should organize the legal system to prevent mistakes by innocent parties, is also misguided. It makes the mistake of stopping one form of error, without taking into account the effects that the new rules will have on a second form of error that has become ever more important in the world of modern tort litigation. That second error is the ability of powerful and successful lawyers to take strategic advantage of the rules, to exercise a set of choices (when to file demurrer, when to ask for discovery or continuance) in ways that can cause material difficulty to the other side. Stated most forcefully, the play in the joints that allows the correction of innocent mistakes in a few marginal cases has become in the hands of master litigators the source of planned opportunism in the huge body of major tort litigation. The jousting over experts, which is one part of the system of discovery, is just one of the most pronounced illustrations of that problem. The rules have gone out of control.

The entire episode with respect to expert witnesses is thus but one important component of the entire reform over the rules of civil procedure. The need for this reform, moreover, illustrates why we can expect the problem of tort reform to remain so intractable in the years to come. Questions of procedure have an intimate impact on the outcomes of tort cases, so that a reform in one area is sure to influence the number of suits, the costs of litigation, the rate of settlement, the settlement amount, the rate of litigation, and through these factors costs of insurance, and the ultimate level of product innovation and product pricing. It is, however, virtually impossible to give precise estimates as to the dollar savings, let alone the social improvements attributable to any single reform. It is also the case that the reforms in question will influence not only tort litigation, but litigation in other arenas as well, so that the constellation of relevant players includes many parties whose connection with the tort system is remote. In this environment we should expect the tyranny of the status quo. After all we have witness to the slender impact of general tort reform at state levels, and the utter absence of tort reform at federal level. The present law, subject only to judicial modifications that bypass the political process, is where the debate begins. It is also likely, for better or worse, to be where the debate ends as well.