Expert Witness Malpractice Actions: Emerging Trend or Aberration?

By

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Expert witnesses have historically enjoyed broad-ranging immunities. But the picture is changing.

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FROM “AMUSEMENT PARKS” TO “ZOOLOGY,” the Technical Advisory Service for Attorneys (TASA) Web site lists more than 9,500 categories of experts. Large accounting firms and other forensic firms perform litigation support services. And the Martindale-Hubbell directory contains more than 4,000 experts, services, suppliers, and consultants. In just a few decades, expert witnesses in litigation have gone from a rarity to the commonplace, for both trial preparation and for actual trial testimony. Often, the expert testimony, especially on damages, is the main event of the case. As one court has noted, “[o]ften they play as great a role in the organization and shaping and evaluation of their client’s case, as do the lawyers.” Murphy v. A.A. Mathews, 841 S.W.2d 671, 682 (Mo. 1992). The amount of time and money expended in this area is substantial; and as every litigator knows, an expert can make or break a case.

But what do you do if that expert performs his or her litigation services work negligently and it results in a poor outcome for your client? What liability does the expert face? What, if any, liability does the attorney who selected and retained the expert face? Yes, it is true that an expert can make or break the case. This article addresses the “break” side of the equation.

THE EROSION OF THE COMMON LAW DOCTRINE OF WITNESS IMMUNITY • Testimonial experts have traditionally been protected from lawsuits arising out of their work by the doctrine of witness immunity. However, a theory of expert witness liability is emerging and several states have ruled that a retained expert witness, the so-called friendly expert witness who testifies voluntarily and who is compensated for his or her services, is no longer shielded from negligence in providing pretrial litigation services or trial testimony. Compare Murphy v. A.A. Mathews, supra, at 680, n.7 (limiting holding to pretrial litigation support services rather than trial testimony) with Marrogi v. Howard, 805 So.2d 1118, 1131 (La. 2002) (holding that there was no immunity for either pretrial work or trial testimony). These cases do not contemplate an action in which a party sues an adverse expert witness hired by an opposing party.
The Traditional Rule

Experts who participated in judicial proceedings traditionally were rewarded with the broad protection of an absolute immunity privilege from subsequent liability for communications related to the action. A longstanding doctrine, it aimed at allowing witnesses to be forthright and candid in their opinions in judicial proceedings without threat of a future defamation suit by an aggrieved party. The privilege applied to any communication “(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that had some connection or logical relation to the action.” *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 781, 787 (Cal. Ct. App. 1992) (“*Mattco I*”). See also *Restatement (Second) of Torts* §588 cmt. a (1977) (“[t]he function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation”). The policy of absolute witness immunity is grounded in concerns that without such protection, witnesses might be fearful of testifying and conform the content of their testimony to protect themselves from future suit.

Although the doctrine originally arose in the context of protecting an expert witness from subsequent defamation claims arising out of the expert’s testimony, some states, either by statute or common law, articulated broad pronouncements of the privilege. The situation of a negligent “friendly” expert was not addressed. Thus, actions by the parties who had retained the expert rarely were pursued. Now, however, that rule is beginning to meet resistance from several courts, a pattern that will be discussed below. See Eric G. Jensen, *When “Hired Guns” Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. Rev. 185, 194-95 (1993), for a helpful discussion of the evolution of witness immunity.

Professional Liability Standards

A discussion of expert witness malpractice requires reference to the general negligence standard to which professionals are held. In California, for example, “[t]he elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.” *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997) (“*Mattco III*”) (citations omitted); see also *Murphy v. A.A. Mathews*, supra; *LLMD of Michigan, Inc. v. Jackson-Cross Co.*, 740 A.2d 186, 191 (Pa. 1999) (“[t]he judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession”).

Legal and Policy Rationales

The reasons for not extending traditional witness immunity to expert witnesses are generally succinct: experts should not be given special protection; if they make a mistake that causes damage they should be held responsible as are other professionals. (For a discussion of arguments for and against see Randall K. Hanson, *Witness Immunity Under Attack: Disarming “Hired Guns,”* 31 Wake Forest L. Rev.