Expert Witness and the D.C. Court of Appeals

A Love-Hate Relationship

By Patrick A. Malone

Any lawyer who has stood in the well of a courtroom is wary of expert witnesses. Experts--at least those on the other side--are too malleable in their views and too prone to charm the jury. And they cost too much.

Courts used to take a hands-off approach in the battle of the experts. With rare exceptions, it was up to the cross-examiner to take down an expert. And unless the expert caved in completely, his or her opinion was almost always sufficient to meet a party's burden of proof.

No more. The District of Columbia Court of Appeals has quietly changed the game, establishing a rule of extreme skepticism toward experts in certain types of cases. At the same time, the court has demanded to see expert testimony in more cases in order to sustain a party's burden of proof.

No case better illustrates these two seemingly contradictory trends than Clark v. District of Columbia,1 decided last September. A disturbed 14-year-old used the elastic waistband from his boxer shorts to hang himself in the D.C.-operated Receiving Home for Children (now closed). He had announced his intention to kill himself a couple of hours earlier. Frankie Clark, his mother, sued the District for negligence. The plaintiff proved at trial that the District's employees violated written policy in failing to keep the boy under constant visual observation, which the home's suicide prevention plan mandated for any youth making current suicide threats. The mother's expert was the chief of juvenile detention facilities in New Jersey. He testified that the District's suicide prevention plan was indeed the standard of care.

Not enough, the Court of Appeals decided. The expert's testimony was held to be suspect because he had failed to give examples of other jurisdictions that used the standard he advocated. The court conceded that the District's violation of its own policy was relevant but said it was insufficient to establish a standard of care. The Court of Appeals found that it was just as likely that the District's written policy represented a higher, more rigorous standard than the "national standard of care." Thus the District could not be held liable merely for violating its own policies. (This is the same child protection system that the ABA Journal recently branded as "worst in the nation.")

Contrast Clark with Lucy Webb Hayes National Training School v. Perotti.2 Chief Judge Bazelon and two of his colleagues on the D.C. Circuit found that violation of a hospital's written policy (coincidentally in a patient suicide case) was enough evidence--even without any expert testimony--to go to the jury on the issue of violation of the hospital's standard of care.

The D.C. Court of Appeals' approach to experts is strikingly different from what has evolved in the federal courts since Daubert v. Merrell Dow Pharmaceuticals, Inc.,3 which held that an expert's methodology for reaching scientific conclusions must be proven reliable before the conclusions themselves will be admitted into evidence. Unlike the federal courts, the D.C. Court of Appeals seems inclined to punt on scientific

issues, applying its hard-look analysis only to experts who opine about the often elusive concept of the national standard of care.

In Robinson v. Group Health Association Inc.4 the defendant's vascular surgeon expert testified that a delay in treatment of the plaintiff's vascular insufficiency made no difference in the plaintiff's having to undergo a partial leg amputation. The plaintiff called a (non-M.D.) podiatrist who said it did make a difference. The Court of Appeals chastised the trial court for relying on the better qualified defense expert and throwing out the plaintiff's case. The battle of the experts is for the jury to decide, the court held.

Going even further, the Court of Appeals in Anderson v. Ford Motor Co.5 reversed a summary judgment for a car manufacturer when the plaintiff had no expert at all on causation. The plaintiff, a police officer, submitted an affidavit that her air bag didn't inflate on impact. The defense expert said that "tear seams" on the bag proved it had fully deployed and further testified that air bags inflate literally faster than an eye can blink, so a driver wouldn't know what had happened. Reinstating the case for trial, the Court of Appeals said, "Whether or not the air bag inflated turns on the credibility of each party's witnesses."6

Contrast this let-the-jury-decide approach to experts with the approach in Messina v. District of Columbia.7 The plaintiff was a fourth-grader who broke her arm in a fall from eight-foot-high monkey bars on a school playground. The plaintiff's expert, a playground designer and builder, testified that industry standards required enough cushioning to withstand a force of 200 G's. He said this requirement meant that eight-foot-high equipment had to have mulch 10 to 12 inches deep below it. The court threw out the case because the expert failed to specify which other school systems followed this standard or which manufacturers recommended it. The expert did say his depth chart had been published many times and that a number of playground equipment manufacturers recommended standard mulch depths, but the court held that without specific examples, the opinion was defective.

The court's opinion in Messina did not make clear whether the expert could not cite examples or just did not do so. But in another recent case, the expert was thrown out because his supporting examples came from the wrong jurisdiction: the District of Columbia. In Travers v. District of Columbia8 the court--over a dissent by Chief Judge Wagner--held that the surgeon's testimony that everyone he knew and worked with used aspirin to prevent clotting after splenectomy when the platelet level reached a certain point was not good enough to establish a standard, because everyone he worked with and knew was in the District of Columbia.

Chief Judge Wagner complained in dissent that the majority, in demanding that the expert be able to prove that the standard he advocated was followed outside the District of Columbia, was turning a landmark malpractice decision on its head. The court in Morrison v. MacNamara,9 had overturned the old "locality rule" that required the plaintiff to prove the local standard of care. The court in Morrison reasoned that physicians in the District were presumed to follow a national standard of care. Thus, the local practice would be relevant to the national standard. After Travers and, more recently, Clark, the new rule is that what the defendant ordinarily does, and what similarly situated local practitioners ordinarily do, matters far less than what others do elsewhere.

What remains murky, for now, is how far an expert must go to prove a national standard. The court in several cases has suggested that published written standards, coupled with an expert's testimony, might establish the national standard. Where no written standards apply to the specific facts of a case (as often happens), the battle of the experts could turn into a contest of hearsay. What happens if the plaintiff's expert finds 10 cities where the experts practice as the plaintiff advocates, but the defendant's expert finds 10 other cities in the defense camp? And what if one expert assures the jury that the other expert is wrong about half of the places that the other expert cited? Will these disputes be decided by the jury? Or will the mere existence of a disagreement between the experts prove, as a matter of law, that there is no relevant national standard? Stay tuned.

The court missed a chance to control expert hearsay in In re Melton,10 a psychiatric commitment case. At issue was whether a man could be recommitted to St. Elizabeths as a danger to himself or others, based on the recommendation of psychiatrists whose testimony was liberally laced with quotations from their out-of-court interviews with the man's family. This included a dramatic revelation that he had recently punched his mother in the nose. She never testified.

The usual rule (derived from Fed. R. Evid. 703) allows such expert hearsay "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." A panel of the court would have added to this a requirement that the out-of-court information must be "of a type for which the underlying reliability of the data can be sufficiently explored through cross-examination of the testifying expert." The en banc D.C. Court of Appeals reversed the panel and said that as long as "minimal standards of reliability" are met--a term that the court explicitly refused to define--the expert could recite hearsay on which others in his field would customarily rely.

The Court of Appeals fluctuates widely between extreme skepticism toward an expert in one case and extreme deference in another. But in civil cases it is quite consistent in applying the rule that whoever has the burden of proof on an issue had better have an expert in court. In the tort cases that dominate the court's expert agenda, the court is deciding more and more that juries (or judges sitting as fact finders) are incompetent to decide an ever-growing body of issues unless they are assisted by the very experts toward whom the appellate court can sometimes be so suspicious.

In Kendrick v. Fox Television11 the court held that a libel plaintiff failed to prove that reporters violated a journalistic standard of care in airing unofficial criminal charges against the plaintiff before obtaining his response. The reporters filed affidavits that they followed the standards of the profession. The plaintiff cited the published code of ethics from the American Society of Newspaper Editors. The court held that the plaintiff should have had an expert to show that "these particular standards are customarily followed by journalists."

Other recent cases show the peril any party faces in failing to obtain an expert's imprimatur for every aspect of the case, no matter how obvious the point may seem. For example, must an expert testify in an "informed consent" case? Yes, the court held in Cleary v. Group Health Association Inc.12 In Cleary the court effectively overruled a venerable and oft-cited precedent--Canterbury v. Spence13--without saying it was doing so. Canterbury's key holding was that an expert is not needed in an informed consent case because

the issue is whether the doctor failed to inform the patient of what reasonable patients would want to know (something the jury can decide). The Cleary court added an exception that virtually swallows the Canterbury rule. The court held that only an expert can testify about whether the defendant surgeon was "unreasonably inaccurate" in his interpretation of the medical literature when he informed the patient about the risks of surgery that the patient wanted but that the surgeon was trying to discourage. The plaintiff in Cleary contended the surgeon had told him the procedure could paralyze his leg or put him in a wheelchair. The surgeon conceded there were no published cases in the medical literature that supported this bleak prognosis. Nonetheless, according to the Court of Appeals, the plaintiff needed an expert to opine that the physician's description of the possible complications was unreasonable.

Cleary represents the law of experts turning full circle. In the old days, one way to block expert testimony was to object that the expert was speaking to the "ultimate issue" that the jury would have to decide. With Cleary and similar cases, the court requires that the expert testify to the ultimate issue.

Another case in which the court arguably changed substantive law in the course of ruling about experts was McNeil Pharmaceutical v. Hawkins.14 As in Cleary, the court held that alleged negligence in disclosure of vital information must be measured from the point of view of the communicator, not of the person receiving the information. The issue in Hawkins was whether the drug manufacturer failed to warn the plaintiff's doctors of the risk that its muscle relaxant might cause fatal liver failure. The drug's labeling said that a few cases of liver damage had occurred but that the causal relationship to the drug was unproven. The plaintiff called experts in gastroenterology who testified that the label didn't have enough information to inform the prescribing physician of the true extent of the possible risk of liver damage. The Court of Appeals vacated the plaintiff's verdict and ordered judgment entered for McNeil. The court held it wasn't sufficient to show what prescribing doctors would need to know about the drug. Rather, the plaintiff had to prove what a reasonable drug manufacturer would do; that required expert testimony from someone familiar with drug industry practices or someone with enough knowledge of Food and Drug Administration statutes and regulations to say that the manufacturer violated those requirements.

Thus, after Hawkins, the most crucial expert in a drug product liability case could turn out to be not the physicians who know about the drug, but regulators and industry officials.

In other cases, the court doesn't lay down a blanket requirement for an expert, but the lack of an expert proves to be the key factor that doomed one side. In Fruehauf Trailer Co., Inc. v. Boston15 the plaintiff won a directed verdict that the defendant's truck liftgate was defectively designed. Crucial to the affirmance by the Court of Appeals was its observation that the defendant called no expert to contradict plaintiff's experts who testified that safer alternative designs existed. Nor did the defendant effectively neutralize the plaintiff's experts by a probing cross-examination. Fruehauf arguably stands for the proposition that an unopposed expert must be believed, contrary to the standard jury instruction that the jury is free to assign as much weight to the expert's opinion as it chooses.

Finally, in an odd epilogue to the Messina case, the court last year found that the same hapless playground expert whose opinion it had rejected in that case gave perfectly proper testimony in another playground case--but only because the subject matter was so obvious that the plaintiff didn't need any expert to

establish a standard of care. In District of Columbia v. Shannon16 the court found that uncapped holes along the side of a slide were so obviously dangerous to children's fingers that the jury could decide the case based on its own common sense. The expert's opinion thus became admissible because it wasn't really needed but might be helpful.

The trend of the cases raises a number of troubling questions: Is there any area of fact-finding where the unaided jury still reigns supreme? Will the trend toward more and more experts squeeze out of court those litigants with small to middling claims that are insufficient to justify the expert's price tag? What is left of the hearsay rule when experts can say pretty much whatthey want as long as they assure the judge that their colleagues do the same?

Behind these questions lies a long-festering tension that will remain unresolved for the foreseeable future: We are suspicious of those who profit from swearing to tell the truth, but we are afraid that without them in court that search for truth will be frustrated. So we turn to them as civilizations once turned to their Delphic oracles: eager to worship them, but ready to destroy any who fail to deliver the certainty we seek.

Notes

1 No. 95-CV-142 (D.C. 1997).
2 419 F.2d 704 (D.C. Cir. 1969).
3 509 U.S. 579 (1993). Technically Daubert, which grew out of Fed. R. Evid. 702, does not apply to D.C.'s local courts.
4 691 A.2d 1147 (D.C. 1997).
5 682 A.2d 651 (D.C. 1996).
6 Id. at 654.
7 663 A.2d 535 (D.C. 1995).
8 672 A.2d 566 (D.C. 1996).
9 407 A.2d 555 (D.C. 1979).
10 597 A.2d 892 (D.C. 1991).
11 659 A.2d 814 (D.C. 1995).
12 691 A.2d 148 (D.C. 1997).
13 464 F.2d 772 (D.C. Cir. 1972).
14 686 A.2d 567 (D.C. 1996).
15 654 A.2d 1272 (D.C. 1995).
16 696 A.2d 1359 (D.C. 1997).

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