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JUDICIAL CONTROL OVER EXPERT TESTIMONY: OF DEFERENCE AND EDUCATION

*Richard A. Epstein**

I. EDUCATION OR DEFERENCE?

In their illuminating paper,¹ Professor Ronald Allen and Mr. Joseph Miller identify the choice between education and deference as critical to formulating sound rules of expert testimony in modern civil litigation. Their analysis applies primarily to tort litigation, especially mass tort litigation, but its ramifications extend to all civil cases. Their general inquiry focuses around one general issue: Exactly what is the proper role of expert witnesses? Should the trier of fact treat the expert witness as an educator who supplies needed information and then make up its own mind about the case? Or should the trier of fact defer to the conclusions of the expert and not seek to educate itself on the underlying issues?

The educational view assumes that experts are there to fill the knowledge gap that confronts every trier of fact (judge or jury, but usually jury in the American context) in dealing with difficult technical matters. The expert's job is to explain to the jury the general principles of the relevant field and then to use those principles to interpret the particular facts at hand. Thereafter the jury is allowed as much (or as little) discretion as it has on any other question of fact. The experts, having done their job as educators, must withdraw from the field and leave the final deliberations to the jury. On this view, the legal constraints on the use of expert evidence are relatively small, for it is assumed that jurors are apt students, able to grasp the difficult concepts that experts teach, and to distinguish wheat from chaff. The trial judge therefore should exercise little control over the selection and behavior of experts, and the admissibility of evidence they offer. He should leave the task of deciding cases to the jury and not undertake to second-guess those outcomes from the bench.

The view demanding jury deference is more suspicious of what juries can and should do: on this view, the expert's function is to communicate

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¹ Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 Nw. U. L. REV. 1131 (1993).

knowledge of his own specialty to the jury, which is then obliged to defer to that expert judgment. The motivating force behind this view is that the expert comes before the jury not as an individual with a set of personal opinions about scientific principles and fact, but as the representative of a larger scientific community whose views are generally harmonious and well established. Because the rules of evidence are, or at least should be, designed to keep the marginal or charlatan witness from the stand, experts from each side of the case should testify on the basis of the same foundation of knowledge. The court should be unwilling to allow into evidence the testimony of any so-called expert who has not submitted his research to the normal process of peer review in scientific journals—a sound view whose impassioned modern champion is Peter Huber.² This position implies that there should be little disagreement between experts on many important cases within the system, so that most of these cases should not be brought at all, or if brought should be immediately resolved by summary judgment—which strikes me as the right result in many of the cases. Bendectin litigation,³ pertussis litigation,⁴ and the Agent Orange litigation⁵ are representative of cases in which the use of expert witnesses has gone astray.

In their contribution to the ongoing debate, Allen and Miller take the position that it is not possible to make any clear resolution of the simmering disputes in the area unless and until one decides which view of expert witnesses should organize the field. In particular, they recognize that Rule 703 of the Federal Rules of Evidence impliedly adopts the educative view of expert witnesses when it allows experts not to disclose the facts or data on which their expert testimony rests.⁶ Yet by the same token, they perceive that Rule 702 has a clear bias toward the educational function, which allows the general use of opinion evidence by expert witnesses to assist the jury in its role as trier of fact.⁷ In dealing with

² Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 736 (1992).

³ See *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290 (6th Cir. 1988), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 488 U.S. 1006 (1989); see also Huber, *supra* note 2, at 731.

⁴ See James D. Cherry, *'Pertussis Vaccine Encephalopathy': It Is Time to Recognize It as the Myth That It Is*, 263 J. AM. MED. ASS'N 1679-80 (1990).

⁵ See *In re "Agent Orange"*, 611 F. Supp. 1223 (E.D.N.Y. 1985).

⁶ See Allen & Miller, *supra* note 1, at 1137. This position seems ironic insofar as it suggests that one educates by not disclosing the foundations for an opinion.

Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

⁷ Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand

the controversy over the familiar *Frye* rule,⁸ Allen and Miller find a bias in favor of the deferential rule to expert testimony because of the effort to keep from the jury many alternative positions that a jury might choose to hear if free to educate itself. They further claim that the Federal Rules of Evidence cannot be read to adopt *Frye* by silence if only because the Rules do not share *Frye's* deferential perspective.⁹ Finally, Allen and Miller note that independently Huber and I both take the same general point of view¹⁰ and adopt a restrictive regime of expert witnesses—in part because of the fear of junk science on which Huber has written so much and in part because of the fear of bias and corruption to which I alluded.

In general, I think that Allen and Miller have asked some important questions about expert witnesses, but I think that their approach falters because it fails to separate three distinct questions of central importance in jury cases. The first question addresses how an expert should inform the jury on matters that are properly left for its decision. One possible approach could *require* the expert to lay the foundation for the particular conclusion that he reaches. The alternative is to allow the expert to testify only as to the conclusion based on experience. The first of these approaches is a call for education, and the second is one for deference.¹¹ A second, and related, question is in a sense the converse of the first. Should the expert be *allowed* to offer foundational evidence for his opinion, or should he be confined to conclusions based on the question at hand? Here it appears (with a little strain) that the first of these approaches is educational and the second is deferential. The third question, directed to admissibility, asks whether certain questions should be left to, or taken from, the jury. One could say that a deferential rule takes the question from the jury, which in a sense is bound to “defer” to the experts by ceding its role as trier of fact. The expert therefore educates the jury only when the jury is allowed to decide the case.

The choice between deferential or educational roles could be raised in any of these three contexts. But the issues involved are quite different, and it seems on balance unwise to conflate them. In this brief Essay I

the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. FED. R. EVID. 702.

⁸ “[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

⁹ Allen & Miller, *supra* note 1, at 1142. Learned opinion is divided on the subject. For an extended discussion of the question, concluding that the Federal Rules “neither incorporate nor repudiate” the *Frye* rule, see *United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir. 1985) (Becker, J.).

¹⁰ Allen & Miller, *supra* note 1, at 1145. For my views, see Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757 (1992).

¹¹ See Allen & Miller, *supra* note 1, at 1133.

shall address two of the issues that Allen and Miller address. Part II is concerned with the proper balance between deference and education; it compares the relative merits of categorical and case-by-case exclusions from evidence by analogy to the hearsay rules. Part III turns to the question of admissibility, and in particular to the question of whether or not the concerns with bias require the strong remedy of exclusion. Once these issues are separated from each other, the choice between deference and education is less critical to the discussion than Allen and Miller suppose.

II. FINDING THE BALANCE

A. *The Hearsay Analogy*

What is striking about the Allen and Miller position is that they do not take (except regarding Huber and me) any strong views on which alternative should be adopted, but are content to rest with the methodological observation that the cross-currents on expert witnesses cannot be resolved unless and until one adopts a uniform view. But why should that be the case? Suppose that both deference and education are appropriate social objectives, but are often in conflict with each other: the goal at that point is to devise the best rule of evidence under the circumstances. In some cases, the subject matter may be so arcane that education becomes impossible and a more categorical approach is required. In other cases, the expert evidence may be on a subject on which juries can, and do, have common sense opinions where expert testimony is nonetheless relevant: at that point looking at the process as one of education is perhaps the wiser course of action. The amount of variation in the cases covered by Rules 702 and 703 is enormous, and it is highly unlikely that any uniform approach will not suffer from possible cross-pressures and counterexamples.

I think that it is possible to take the point one step further, and to claim that both points of view are necessarily permanent features of any system of fact-finding so long as the legal system maintains the distinction between matters of admissibility and matters going solely to the weight of the evidence. In order to see why this is the case, it is necessary to first ask why we have any rules on admissibility of evidence in the first place. In principle, if the quality of the evidence is manifestly suspect, then the jury could be allowed to hear it, only to reject it because of its utterly unpersuasive weight. Hearsay testimony could be subject to the same analysis: we could jettison the basic prohibition against admitting hearsay into evidence and stop worrying about its multiple exceptions.¹²

¹² Indeed, Allen claims that the erosion of the hearsay rule proceeded apace even though the rules of evidence in every jurisdiction provide for its preservation, albeit with multiple exceptions. See Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797 (1992).

The jury could then hear all hearsay evidence, and the opposing party could seek to undercut the strength of the evidence by laboriously showing each layer of hearsay on which the evidence rests. The law might be much simpler to articulate, but trials would be more complicated, given the sheer amount of evidence that would have to be presented and critiqued before the jury could reach its verdict—which on this view could never be overridden by a judge for any reason.

We do not have anything that remotely resembles this freewheeling system. Surely the reason must be that we think that there are at least some cases in which a categorical rule excluding certain evidence from the trier of fact is more likely to yield better results than a rule that treats all attacks as going to the weight of the evidence and never to its admissibility. One advantage of a system with categorical rules is that it creates a somewhat higher level of uniformity than is found under the freewheeling system of open admissibility. Some juries may rate errors in perception, sincerity, memory, and narration rather high, and discount the evidence entirely; others may think that, in this case, the fine personal qualities of a witness are sufficient for the jury to place great weight on the hearsay evidence. The want of uniformity leads to charges of inconsistency, and it opens the legal system to charges of favoritism. To be sure, a difference in outcome may make perfectly good sense when similarly situated parties adopt different strategies in response to a common problem. But differences in legal rulings in the face of identical strategies leave everyone uneasy, even if we cannot agree on the right result.

On a second front, the use of categorical rules should reduce the cost of operating the system, because the life history of each piece of hearsay evidence need not be extensively debated before deciding what should be done with it. Trials will be streamlined, and the more probative evidence (determined categorically) will receive the greater weight. And if the hearsay rule and its exceptions are chosen with sufficient care, then there should be high correlation between the classes of evidence admitted and the classes of evidence that are truly probative, resulting in better outcomes all the way around.

B. Expert Evidence: Too Much or Too Little?

This analysis of the distinction between weight and admissibility ties into Allen and Miller's distinction between education and deference. Once it is decided that evidence will be admissible, then the function of the evidence must necessarily be educative because the jury can disregard the evidence in reaching its verdict. To say that the evidence should be treated as dispositive, so that the jury must defer to the party that has presented it, is to say that other evidence must be kept out. Thus, if both sides introduce expert evidence, what does it mean to adopt the deferential view if the jury has the power to decide *to which* view it wishes to

defer?¹³ The only sensible distinction between deference and education that can be drawn is the case in which the judge says that this expert evidence is so weak and unreliable that it should be treated like garden-variety hearsay and thus excluded. Consequently, we can decide on the educative value of evidence only if we can decide whether it is worth admitting the evidence in the first place. The basic inquiry, then, is to find those rules that permit the reliable sorting of expert testimony.

What legal rules are available to improve the quality of expert testimony? On this front, the question of what should be admitted into evidence raises rather different issues from those involved with the hearsay rule and its exceptions. Wholly apart from the question of bias (to which I shall return), the presentation of expert testimony raises important questions about the theory of knowledge, especially in those areas that are likely to be most crucial to litigation, namely, cases in which expert *judgment* is at issue. It is often difficult for experts, outside of the legal arena, to articulate the grounds on which their judgment rests. On biological or medical questions, for example, judgment often comes from an accretion of small bits of information into a whole that is more coherent than the sum of its parts.

Indeed, much of the work of Friedrich Hayek is dedicated to the proposition that forms of local knowledge, acquired by people in their own specialized line of business, may be more reliable than the rational arguments that outsiders to the business are so eager to make. So often we hear individuals in the trade flatly state without explanation that a suggestion won't work as proposed, while outsiders are all too willing to give finespun explanations for why the proposal will be successful. Such arguments are debates between rational discourse based on general theory and situation-bound judgments based on large bodies of unsystematized experiential data. Those who are best at the Socratic game (and guess what profession we come from!) may in fact provide far less reliable information than those with extensive experience, but with limited verbal facility. An ideal system of expert evidence would place the advantage with the person who has the knowledge, not the person who is able to speak with greater confidence or urbanity.

Rules like 702 and 703 might be defended on the ground that the reliance on inadmissible facts or data (Rule 703) or opinion evidence (Rule 702) suggests that such rules are motivated by the sole concern of reducing threshold barriers on admissibility of decisive testimony without extensive skirmishes that lay the foundation for critical conclusions

¹³ "In a system designed to encourage deference, such as that embraced by Rule 703, *Frye* makes perfect sense. If fact finders must either defer to an expert or choose (unintelligently) between competing experts, some check on irrationality is necessary. *Frye* provides precisely that check." Allen & Miller, *supra* note 1, at 1142. What is odd about this passage is that the idea of deference presupposes that expert testimony has a necessary compulsion that flattens all in its way. How then can one merge the idea of uninformed choice with the idea of deference, as Allen and Miller presuppose?

of admissibility. The expert is not required to demonstrate the influence of each individual foundational case on the expert's current set of beliefs, nor to trace out the pattern of inference and observation that may be informed by a lifetime of work in a given area. All these issues are left to cross-examination where matters of weight can receive a more nuanced reading than matters of admissibility. One advantage of this system is that the opponent of the evidence may cull a few representative cases on which to base the cross-examination, instead of having the proponent of that evidence run through thousands of illustrations, many of which will never be in issue in the first place.

The tradeoff involved here does not appear to be one between deference and education, for the question does not concern what types of evidence are kept out, but what types of evidence are *not* required to be admitted. At this point, one asks whether the introduction of additional evidence as a matter of course is worth it: the new evidence leads one down all sorts of tangential paths. Certainly it is a fair question to ask whether cross-examination about an earlier incident that has helped form the expert's views leads us down a byway that lengthens the trial and diverts the jury from the main issue in the case. Rules 702 and 703 to this unpracticed eye apparently assume that the gains from judicial economy more than offset any loss in precision achieved by requiring foundational evidence for an expert opinion on some critical question of fact. Viewed in that way, these rules are more coherent than Allen and Miller suppose.

III. THE PROBLEM OF BIAS

Other risks remain, however, for expert evidence as they do for hearsay. Do we believe that certain types of experts present such grave risks to the operation of the jury system that their testimony should be excluded altogether? The rules concerning the qualification of experts make sense for the same reasons as the hearsay exclusion. Uniform judgments are preferred to ad hoc ones. Quick and simple rules are preferred to endless disputations. And categorical rules are thought to yield more reliable results, in any event. Should some purported experts be excluded from testifying because their testimony is likely to make matters worse?

In dealing with this question, Allen and Miller take issue with the position adopted by Peter Huber¹⁴ and seconded by myself.¹⁵ As is typical of our very different intellectual styles, Huber proceeds by amassing a large amount of anecdotal evidence on the conduct of certain trials, and concludes that vast amounts of junk science make their way into the courtroom where it does more harm than good. He speaks in this vein about trauma cancer cases as well as Agent Orange, Bendectin, and per-

¹⁴ See Huber, *supra* note 2.

¹⁵ Epstein, *supra* note 10, at 758-60.

tussis cases. In all these situations he perceives that rogue witnesses are allowed to testify against the weight of the professional evidence in the field and have more success (because they have some success) than they should ever be allowed. My own view, which parallels Huber's on this point, derives from a more abstract conviction that bias is an important consideration that has to be taken into account in setting evidentiary rules and that the close working relationship between experts and their clients threatens objectivity and neutrality, resulting in serious damage to the trial system. Allen and Miller are skeptical about this analysis and take the view that the jury is able to discount in advance any risk of bias that might creep into the testimony offered by an expert witness. Opposing lawyers can make it clear whether experts have a financial interest in the outcome of a case. They can bring out the fact that testimony has been rehearsed and that the same witness has worked for the same lawyers on numerous previous occasions. Given these techniques of cross-examination, Allen and Miller concluded that if my fears about expert evidence were true, then "it would be evidence of remarkable and disqualifying stupidity," for which they do not find any substantial evidence.¹⁶

In dealing with this response, I think that first it is important to note that Huber's anecdotal evidence is more discouraging than Allen and Miller allow.¹⁷ The Bendectin cases largely proceeded on the work of a single expert witness, Dr. Alan K. Done, who, against the entire weight of evidence in the medical community, was willing to testify that Bendectin was a teratogen. He was able to persuade a jury as to the soundness of his judgment in one case; the jury's verdict was then upheld on the mistaken view that in cases of this sort there is a "classic battle of the experts . . . in which the jury must decide the victor."¹⁸ A corporation can win an overwhelming proportion of the cases brought against it and still face financial ruin as a result of one groundless verdict.

It may well be that there are many individual cases in which competent experts testify on both sides of a difficult question of fact and where the success of each expert should depend largely on her persuasive power. Certainly I have no quarrel with allowing these cases to go forward, and I doubt that Huber does either. But in the mass tort setting, the inability to block the use of a dubious expert peddling a dubious theory can cause enormous social dislocations (as with Bendectin itself,

¹⁶ Allen & Miller, *supra* note 1, at 1146. Footnote 52 contains the qualification that "[w]e put aside pure questions of cost," *id.* at 1145 n.52, which is always a dangerous qualification, especially since their educational approach requires a lot more by way of legal tuition than does their deferential one.

¹⁷ See Huber, *supra* note 2.

¹⁸ *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1535 (D.C. Cir. 1984). This language was picked up in the Bendectin decision of *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, 1110 (D.C. 1986), although *Ferebee* itself has been disapproved. See *Papas v. Upjohn*, 926 F.2d 1019, 1021 (11th Cir. 1991).

withdrawn from the market because of litigation expenses and some liability verdicts).¹⁹ In practice, the line between admission and weight of evidence is often as important as the line between summary judgment and jury trial. Where a party cannot get the summary judgment, the pressure to settle before trial becomes enormous, and so long as there is a two-horse race the settlement will not come at one cent on the dollar.

Nor does one have to assume that a jury is stupid or malicious to be uneasy about expert testimony. We do not make that assumption to exclude hearsay evidence, even though the opponent of hearsay evidence, if admissible, can cross-examine the witness on sincerity, perception, narration, and memory to his heart's content. Why then assume that a jury's native skepticism will be sufficient to discount bad expert testimony? The matters here are those of magnitude; even if a jury tries to discount evidence because of bias or connection, it may not be able to do its sums correctly, since it has little experience in the expert's field. In addition, at least one institutional obstacle makes the jury's task more difficult than it ought to be. In general, a jury is aware that there are some barriers to the introduction of quack evidence, but may well be unable to perceive how high those barriers are in the broad run of cases or how they operate in the confines of a particular case. The mere fact that expert evidence is let into a case signals to the jury that there will be a horse race worth running, and contests of that sort are never certainties.

Allen and Miller note that good lawyers can belittle weak expert evidence. But good lawyers ply their trade on both sides of these cases. If the opponent to the expert (usually the defendant) notes that the same witness has testified in fifty separate cases, then the good lawyer for the plaintiff knows the correct populist rhetoric to neutralize that bit of evidence: the unified stance of the profession has made it impossible for other experts to step forward and blow the whistle on the corrupt business structure on trial in this case. "Send them a message" is a refrain that echoes across the land. If the defense lawyer points out that the same witness has worked in fifty cases, the answer is, why not, since he has the expertise and has helped to prevail in other cases. In most cases, techniques of that sort will not work; the experts for the defense will have better evidence and will persuade a jury. But so long as the risk remains appreciable that this case will go the other way, getting past the admissibility hurdle could be worth millions of dollars in many important institutional settings. Having followed the Bendectin saga, I am hard pressed to share the optimism that Allen and Miller have on this issue, and I think that somewhat tougher standards on the admissibility of expert evidence are still welcome and needed today. It may just be that the rene-

¹⁹ See *Lynch v. Merrell-National Lab.*, 830 F.2d 1190, 1194 (1st Cir. 1987) ("[W]hile Bendectin usage declined from 1 million new therapy starts in 1979 to zero in 1984, there has been no change in the incidence of birth defects.") (citations omitted). The renewed judicial scrutiny in this case came too little, too late.

gade scientist has got it right when all others have got it wrong. But we have to play the odds. And if that renegade is not prepared to submit the evidence in question to peer review and professional cross-examination, I am not prepared to accept the long shot that he has been cast out of the community by some corrupt establishment.

The battle between deference and education is, as the last section of Allen and Miller's paper reveals, a battle over admissibility or credibility. Here it is clear that so long as we have a jury system, there cannot be a dominant solution either way. The proposals that I made in my earlier essay were designed to find some way to shield the expert from the influence of the party while allowing that expert to gain information about the case sufficient to voice an informed opinion. I am far from confident that these proposals will work, although I hope that some of them (such as the limitations on coaching) might be given a try. And I worry, now that I have been an expert on one occasion, that any sharp prohibition against contact with the parties may have the unfortunate effect, at least on the matters of law and economics on which I work, of keeping the expert from learning enough about industry structure and industry practice to form an intelligent opinion about the situation. But on one point I am tolerably clear: The rules on expert witnesses should be tightened up, especially in the mass tort cases. The problem of bias is one that will not go away, even with an education worthy of an advanced degree.