The “Standard of Care” and Negligence of the Forensic Engineer

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Summary

In the US, engineers serving as expert witnesses may be asked by any side in a dispute to provide opinion testimony concerning the performance of an engineer defendant. The expert witness may be asked what the “standard of care” of the profession was, and whether the defendant met or failed to meet that level of performance. The expert witness may also be the subject of such an inquiry, if the expert’s services are themselves questioned. This paper presents the concept of the standard of care, and describes how the services of a forensic engineer are measured relative to the standard of care. It also discusses the concept of immunity from negligence afforded to expert witnesses, and the current trend of erosion of that immunity.

Keywords: standard of care; professional negligence; expert witness.

1. Introduction

In civil litigation in the United States, forensic engineers serving as expert witnesses are occasionally asked to present testimony regarding a practitioner’s professional negligence. This question hinges on the concept of the “standard of care,” which can be thought of as the boundary between negligent and non-negligent error.

In providing forensic engineering services, including assessing another engineer’s performance relative to the standard of care, forensic engineers themselves are held to that same “standard.” This paper presents the concept of the standard of care, and describes how a forensic engineer’s services are measured relative to the standard of care. It also discusses the concept of the immunity from negligence afforded to expert witnesses, and the current trend of erosion of that immunity.

2. The Standard of Care

Case law [1] [2] in the US allows professionals some leeway with regard to error: there is some level, degree or type of error which a professional may commit without incurring liability, or responsibility to pay for damages arising from that error. However, some errors are of the level, degree or type that the professional may be liable. Those errors are called negligent errors, and the boundary between negligent and non-negligent errors is called the “standard of care.”

2.1 Definition of the Standard of Care

The standard of care has been defined in case law and has been presented in what are known as standard or pattern jury instructions. After a civil lawsuit is argued in court, and the jury is preparing to deliberate on the evidence presented and answer the ultimate question of fact raised by the lawsuit, the court gives the jury a set of instructions they should follow to answer the questions.

2.1.1 Pattern Jury Instructions

Sets of pattern jury instructions have been compiled into reference documents. One such compilation of pattern instruction, the Book of Approved Jury Instructions [3], included the following:
6.37 The Duty of a Professional

In performing professional services for a client, a professional has the duty to have that degree of learning and skill ordinarily possessed by reputable professionals, practicing in the same or similar locality and under similar circumstances. It is his or her further duty to use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or similar locality under similar circumstances, and to use reasonable diligence and his or her best judgment in the exercise of professional skill and in the application of learning, in an effort to accomplish the purpose for which he or she was employed. A failure to fulfill any such duty is negligence.

The Book of Approved Jury Instructions was revised since that 1986 publication, and in fact is no longer typically used in California. In its place, The Judicial Council of California has published Judicial Council of California Civil Jury Instructions (“CACI”)[4], which includes the following:

600. Standard of Care

[A/An] [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

The wording of a jury instruction is not limited to the pattern instructions, and if, based on fact and opinion evidence admitted in court during the trial, a judge finds that a different instruction would more accurately state the law and be understood by jurors, the pattern instruction need not be used.

2.2 Elements of the Standard of Care

BAJI 6.37 identifies attributes of learning, skill, care, diligence and judgment as duties of a professional, and states that those attributes are to be applied by the professional in an effort to accomplish the purpose for which the professional was hired. The CACI instruction, on the other hand, lists skill, knowledge and care as attributes contributing to the duty of a professional, but does not include diligence or judgment, nor does it require consideration of the purpose for which the professional was hired.

CACI also instructs the jury to compare the professional whose performance is being examined with that of what “a reasonably careful professional would have used in similar circumstances.” BAJI doesn’t require comparison with what someone “would” have done – it requires comparison with what reasonable practitioners actually did in similar locales and circumstances. Testimony concerning what a reasonable professional would have done allows an amount of conjecture because the measuring of what one “would have done” may be more subject to bias than would measuring what someone actually did. For these reasons, BAJI’s instruction concerning the duty of a professional is a better definition of the standard of care than is the CACI instruction.

The jury can determine the facts concerning the standard of care, and concerning the performance of the defendant engineer, by answering the following questions:

• Does the defendant have the degree of learning and skill ordinarily possessed by reputable professionals, practicing in the same or similar locality, and under similar circumstances?
• Did the defendant use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or similar locality and under similar circumstances?

• Did the defendant use reasonable diligence?

• Did the defendant use his or her best judgment?

• Did the defendant do all that in an effort to accomplish the purpose for which he or she was employed?

To answer those questions, the following also have to be determined:

• Who are “reputable professionals”?

• What are “same or similar” localities and circumstances?

• What is “skill”?

• What is “care”?

• What are “like cases”?  

• What learning and skill are “ordinarily possessed”?

• What care and skill is “ordinarily used”?

• What is “reasonable diligence”?

• What is “judgment”?

• What is the defendant’s “best judgment”?

• What was the purpose for which the defendant was employed?

2.3 Expert Testimony Concerning the Standard of Care

According to U. S. Federal Rule of Evidence (FRE) 702, the purpose of expert witness testimony is to “assist the trier of fact to understand the evidence or to determine a fact in issue” [5]. Under that rule, expert testimony is admissible in Federal Court if: 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case. The wording of FRE 702 has been influenced by case law such as Daubert [6] and Kumho [7] which established criteria for courts to rule on the admissibility of scientific and non-scientific technical evidence. Some state jurisdictions have not embraced FRE 702, or the Daubert and Kumho standard for admissibility, but instead follow the standard defined in Frye [8], which requires that the expert’s testimony “must be deduced from a well-recognized scientific principle or discovery, and 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.” One application of the “general acceptance” test requires the methods used by an expert to support an opinion be those methods that are generally accepted within the relevant scientific community.

To find that a defendant engineer is negligent using the definition of the duty of a professional as presented in BAJI 6.37, a jury would have to understand the learning, skill, diligence, judgment and care of the defendant and of other professionals in similar locales and circumstances, and understand the purpose for which the defendant engineer was hired. These are facts the jury typically requires the assistance of expert testimony to understand in order to answer the above bulleted questions. Expert witnesses may testify for the purpose of assisting the jury in their determining the answers to those questions.

Forensic engineers can be retained by attorneys or parties to the lawsuit (or in some situations by the court itself) to investigate the technical aspects of the dispute and, when admitted by the court,
to offer expert opinion testimony for the purpose of assisting the jury. The forensic engineer expert is ethically obliged to offer truthful evidence, developed through valid and reliable means, in the best possible light for the party that retained the expert [9]. Ideally, competent forensic engineers testify for each side, allowing the jury to understand the technical evidence from all sides. With that understanding, the jury can answer the ultimate questions of fact concerning the defendant’s negligence.

### 3. Professional Negligence of an Expert Witness

Licensed professional engineers providing forensic and expert services are held to the same standard of care as the defendant in a professional negligence suit. That is, they have the duty to possess and use the level of learning, skill and care of engineers providing forensic and expert services in similar locales and circumstances, and to use reasonable diligence and their own best judgment in an effort to accomplish the purpose for which they were hired. If forensic engineers fail to fulfill that duty, they can be found negligent and therefore might be liable for damages caused by their negligence.

Four general areas where an expert witness may face claims of professional negligence, or failing to meet the standard of care for expert witnesses, are: failing to accurately estimate damages, failing to perform an adequately extensive investigation, failing to persuade the trier of fact, and changing the expert’s opinion [10]. Carper [11] identifies other possible sources negligence on the part of an expert witness, including use of fraudulent credentials, failure to timely deliver reports and conclusions, use of invalid investigative procedures, inaccuracy of computations, and the charging of unreasonable fees for services.

Despite those identified risks, there are not many cases in the published record where a forensic engineer expert has been sued for negligence in providing forensic or expert services. One [12] arose out of a wrongful death lawsuit filed after a worker died in an accident involving a forklift. In a deposition of an expert mechanical engineer hired by the attorney for the worker, the expert did not identify any safety standards applicable to forklifts. However, later when the forklift manufacturer moved for summary judgment, the expert stated in a declaration that the vehicle failed several safety standards. The court granted summary judgment, noting that the expert had contradicted himself. The decedent’s family filed a malpractice (professional negligence) suit against their forensic expert.

There are cases where experts other than forensic engineers have been sued for professional negligence arising out of their testimony. One such case [13] involved a medical expert (Swerdlow) retained by a family who was suing a doctor for damages arising from the death of their daughter, a surgery patient. The expert testified in his deposition that the patient should not have been released from the hospital after her surgery because of the amount of pain he understood she was experiencing at that time. He testified that it was his opinion the doctors who released the patient were negligent in that a patient experiencing that amount of pain should have been kept in the hospital for observation and treatment. After reading the opposing party’s expert subsequent deposition testimony, however, the plaintiff’s expert changed his opinion. His opinion after reading the deposition testimony of the opposing expert was that the doctors did not know of the high level of pain, and instead knew only of the patient’s reports of a much lower level of pain. Under those circumstances, the expert was of the opinion that the doctors who released the patient were not negligent. At that point, just days before the trial was scheduled to start, the plaintiff’s expert wrote an addendum to his own deposition transcript stating his revised opinion that the original doctor was not negligent. The expert sent that addendum document, without notifying the plaintiff’s attorney beforehand, to both the plaintiff’s attorney and the defendant’s attorney. The defendant filed and was granted a motion for summary judgment based on the plaintiff’s expert’s addendum to his deposition wherein he stated his opinion that the doctors were not negligent. The family sued the expert for professional negligence in his providing expert witness services alleging that the way he abruptly and at such a late date changed his opinion was the cause of the court’s dismissal of their case against the doctor. The expert challenged the suit against him, claiming that his changing his opinion was not the cause of the plaintiff losing their case. That question of causation was adjudicated by the Federal Circuit Court and the negligence case against the expert was allowed to proceed.
3.1 Immunity of the Expert Witness

United States Supreme Court has ruled that witnesses cannot be sued for the content of their testimony. In Briscoe v. LaHue [14], the Court of Appeals for the Seventh Circuit held that witnesses are absolutely immune from liability damages based on their testimony. The concept of witness immunity is generally understood to be in the public interest because without it, witnesses might be unwilling to testify because of a fear of legal retribution. Cases that have been brought against expert witnesses point out the inherent conflict between a need to encourage testimony by expert witnesses and the need to assure that expert witnesses testify in a professional manner.

In a dissenting opinion in Pace, the case cited above concerning the medical expert, Appellate Court Judge Gorsuch wrote:

*Here, we have cause for even greater concern. Allowing this claim to march along sends the message to would-be expert witnesses: Be wary – very wary – of changing your mind, even when doing so might be consistent with, or compelled by, the standards of your profession. Neither can there be any doubt this is exactly the message plaintiffs wish to send, candidly explaining, as they do, that their real beef with Dr. Swerdlow was his failure to “deliver[] the expert liability opinion he had promised the Paces all along.” In our legal system, demanding that experts “deliver” a specified opinion, as opposed to their honest judgment, is supposed to be ethically out-of-bounds – not the basis for a cause of action.*

*Parties already exert substantial influence over expert witnesses, often paying them handsomely for their time, and expert witnesses are, unfortunately and all too frequently, already regarded in some quarters as little more than hired guns. When expert witnesses can be forced to defend themselves in federal court beyond the pleading stage simply for changing their opinions – with no factual allegation to suggest anything other than an honest change in view based on a review of new information – we add fuel to this fire. We make candor an expensive option and risk incenting experts to dissemble rather than change their views in the face of compelling new information. The loser in all this is, of course, the truth-finding function and cause of justice our legal system is designed to serve.*

3.2 Erosion of the Immunity of Expert Witnesses

The immunity of expert witnesses has been eroding in recent years due to such cases as Jones v. Kaney in England [15], and Pollock v. Panjabi [16] among others in the United States. In Jones, a medical expert for Mr. Jones, an injured party in a suit against an insurance company concerning injuries caused by a traffic accident, signed a joint experts’ statement concerning the injuries despite the fact that she held an opinion contrary to that presented in the joint statement. Jones’ case was settled for an amount with which Jones was unsatisfied, so he sued his expert, Kaney, for professional negligence. Kaney argued that she was protected against Jones’ negligence claim by case law establishing witness immunity. The lower court accepted that argument, but Jones appealed. The UK Supreme Court, in a 5 to 2 split decision, reversed that decision and wrote in the majority decision that an expert should “perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. . . .”

In Pollock, Dr. Panjabi, an expert in spinal biomechanics, performed laboratory tests intended to show whether a restraint hold performed by a policeman during an arrest had caused debilitating spinal injury to attorney Pollock’s client, a Mr. Green. Dr. Panjabi’s testimony was shown to be based on invalid and unreliable testing methods, and therefore was not admissible at trial. Without valid and reliable technical evidence to the contrary, Mr. Green’s injuries were adjudicated to have
not been caused by the restraint hold, and the court awarded costs against Green. Pollack and Green filed suit against Panjabi claiming, among other causes of action, they were damaged by the professional negligence of Panjabi in his use of invalid and unreliable methods to come to his expert opinion. Panjabi filed a motion to strike because Panjabi was protected by the doctrine of witness immunity. The court recognized that witness immunity was an important and valid doctrine, but that it did not apply in this suit because Dr. Panjabi failed to use valid and reliable means to come to his opinion. The decision to deny Panjabi’s motion to strike included this quote from another case, LLMD v. Jackson [17]:

The goal [of witness immunity] of ensuring that the path to truth is unobstructed and the judicial process is protected, by fostering an atmosphere where the expert witness will be forthright and candid in stating his or her opinion, is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion. The 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.

The court in Pollock found that the LLMD argument was appropriate and relevant to its case, and denied the motion to strike.

4. Conclusions

Professional engineers providing forensic engineering and expert witness services are held to the same standard of care as professional engineers providing other services. That is, they have the duty to possess and use the level of learning, skill and care of engineers providing forensic and expert services in similar locales and circumstances, and to use reasonable diligence and their own best judgment in an effort to accomplish the purpose for which they were hired. The doctrine of witness immunity does not give the forensic engineer serving as an expert witness a free pass to violate that duty.

References


