

## **Punishing Experts, or Protecting the Courts?**

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We believe that there are several misstatements and factual reporting errors in the article *Punishing Medical Experts for Unethical Testimony: A Step in the Right Direction or a Step too Far?*, by David Resnik.<sup>1</sup> To begin, the article seems to have taken news accounts and plaintiff documents as source material in factual analysis of the *Lustgarten* case. However, the transcripts of hearings and depositions in this case are publicly available from the NCMB, and have been analyzed on the website of the Coalition and Center for Ethical Medical Testimony,<sup>2</sup> correcting some of the misinformation promulgated by the press.

The first factual misstatement is that "Lustgarten also speculated that Jaufman had falsified medical records to cover up his mistakes." As the record shows, the speculation made by Lustgarten was that Jaufman had temporized medical records in order to protect his partner Keranen. (But sworn testimony by witnesses refuted this speculation by affirming the observation entered by Jaufman in the medical record.<sup>3</sup>)

Another example of error is found in the quote, attributed in the press to Lustgarten's attorney, that "NCMB does not know of any cases in the U.S. where a board has acted against a physician for unethical conduct related to expert testimony". That was and is incorrect. In fact, counsel for the NCMB and Lustgarten's attorney knew of several such cases, as I informed both attorneys myself of the existence of these cases before the hearing.

I argue that the Court documents were misquoted as well. The article states that "The Court found that the statute granting the NCMB the authority to discipline physicians was unconstitutionally vague as applied to Lustgarten's testimony concerning the standard of care in a medical malpractice case because the statute does 'place a reasonably intelligent member of the-profession on notice he or she could be disciplined for such conduct'." The decision actually reads that the statute "does NOT put a reasonable, intelligent member of the profession on notice that repeatedly misstating the standards of care while testifying as an expert witness would be contrary to honesty, justice, or good morals". As a matter of law, this is why the court ruled that the Board could not discipline

Lustgarten for this portion of his testimony, though the court confirmed the factual findings of the Board that Lustgarten had repeatedly misrepresented the standard.

The author states that "To qualify as an expert, a witness need only possess the requisite knowledge and skill of the defendant's standard of care. Thus, a general surgeon could testify against a plastic surgeon on matters of general surgery, or a psychiatrist could testify on post-operative care for breast implants." Although this may strictly be true with respect to Federal Court (where qualifications are not defined, but subject to the discretion of the judge), the majority of medical malpractice actions are tried in state courts. The statutory qualifications for medical expert witnesses vary substantially from state to state, and this blanket statement is not accurate.<sup>4</sup>

The article states, "For an expert witness to tell a lie, he must be making an assertion of fact rather than an assertion of opinion." Generally, expert witnesses are the only witnesses allowed to present both "fact" and "opinion" testimony. One problem this creates is that experts do not always make clear whether they are stating "fact" or "opinion" in their testimony. When an opinion is rendered, it should almost always be, but often is not, supported by or based upon fact. Experts frequently assert the standard of care as if it is fact, in order to persuade jurors to see the case in the light most favorable to "their" side. This is a major recurring difficulty in medical expert witness testimony particularly.

"When someone asserts an opinion, on the other hand, they are only claiming that the assertion is reasonable." This is precisely the problem with a great deal of medical expert testimony. "Successful" experts know that to the extent that they can convince jurors of their belief in their own assertions, such assertions will be perceived by lay persons as factual.<sup>5</sup> Rarely would an expert be retained if he or she reminded the jury at each juncture that an assertion is only his or her opinion, and that it is merely a "reasonable" assertion. No one would hire that expert.<sup>6</sup>

The article states "An inference is reasonable if it is a conclusion that is well supported by one's evidence or assumptions." The California Supreme Court recently confirmed this (for California, at least) in its decision in *Jennings v. Palomar-Pomerado Health Systems*,<sup>7</sup> stating that "an expert's opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and must be excluded from evidence." The problem is that many witnesses, like Lustgarten and the one in the *Jennings* case, either expressly or implicitly rely solely on their purported "knowledge and experience" rather than on any available evidence or supportable assumptions, and sometimes in spite of evidence to the contrary, as in the *Lustgarten* case. Having no way to judge the knowledge or actual experience of the witness, juries often rely on an expert's claimed credentials to determine the likelihood of appropriate experience on which the expert bases his or her conclusions.

"There (sic) mere fact that an expert adopts a minority view is also no indication that the expert is drawing an unreasonable inference, since minority viewpoints can still be reasonable. An expert makes an unreasonable inference only when he/she draws an inference that no expert would draw, given the evidence and assumptions."

This statement seems to imply that the only expert testimony which could be considered unethical is testimony making inferences which NO other expert could possibly draw. If one other expert might say the same thing, is it then acceptable and ethical? The law in many states supports a "respectable minority" defense, which would recognize as standard a practice that is followed by at least a respectable number of peers (without prescribing what is "respectable"). But one peer would not be sufficient to establish a respectable minority defense. So would, as the author implies, the concurrence of *one* expert that a practice lies outside the standard be sufficient to justify such an inference as reasonable?

The article also fails to mention that an ethical expert has an obligation to *reveal* to a jury that his or her view may be a minority view, and that there are other schools of thought or views (if such is true).<sup>8</sup> Suppose an expert found one other colleague who would agree with his interpretation of the facts. Would this make the expert's opinion reasonable and ethical? Would s/he be obliged to reveal that only one other practitioner shares this view? In the Austin case discussed in the article, records reveal that Austin made a categorical statement about the standard of care for a certain neurosurgical procedure, and testified that the majority of neurosurgeons would agree with him. Not one of his colleagues in the AANS agreed with him.

"At a deeper level, one might argue that expert testimony is opinion testimony because statements about the standard of care do not describe facts." We would generally agree with this latter statement, for the undeniable reason that nowhere is the standard of care for any medical specialty proven scientifically, or even agreed to by a majority of the profession. Since the concept of medical "standard of care" is a legal construction and not fact, the only evidence which could possibly be adduced about it would be opinion. But does this give the expert license to say anything at all and be protected from any kind of review for veracity? Again, the problem is that lay juries can easily be led to believe an impressive witness's recitation that a certain practice constitutes (or breaches) the standard of care. Rare is the expert who admits that there is as yet no valid way to determine the actual standard of care, or that many would disagree with him or her.

The pronouncement which we consider most troublesome about Resnik's article, however, is the following:

Statements about the standard of care are normative (or prescriptive) statements about how physicians ought to behave, not descriptive statements about how physicians tend to behave. Normative statements do not describe facts about the world; instead, they reflect our commitments, goals, and ideals.

This is a misstatement about the standard of care in the majority of U.S. jurisdictions. Testimony given by an expert to a jury about the standard of care should be confined to the actual existing standard, insofar as it can be ascertained, and NOT to some ideal, which would in many cases far exceed the actual legal requirement, correctly stated earlier in the article. Explains one legal expert, "Perfection is the social aspiration, but not a legal requirement; an honest effort in conformity with customary standards is all that can be demanded of physicians."<sup>9</sup> Even in those states which recognize the so called "reasonable care" standard, the care required is "reasonable", not necessary ideal and not simply aspirational.

"All courts grant all witnesses, including expert witnesses, immunity from torts related to their testimony." This was once true, but is no longer, particularly in the case of paid professional expert witnesses, as recent cases have demonstrated.<sup>10</sup>

"Additionally, sanctioning experts for the testimony could also have an adverse impact on access to the courts, since it will deter qualified experts from testifying in medical malpractice cases."

Is there any evidence that *qualified* experts are likely to be sanctioned and thereby deterred? Isn't it more likely that *unqualified*, overreaching experts, or those who have been sanctioned for dishonesty in testimony would be the ones who are deterred?

Said the Missouri Supreme Court in *Murphy v. Mathews*, "There is no reason to believe that professionals will abandon the area of litigation support merely because they will be held to the same standard of care applicable to their other areas of practice."<sup>11</sup>

"If the state takes steps that would have a detrimental impact on medical experts' willingness to testify for plaintiffs in malpractice cases, then this would deny a potential class of plaintiffs the opportunity to litigate these cases and would prevent individual plaintiffs from having access to the basic tools they need to litigate."

Why would peer review of testimony by a state medical board uniquely affect *plaintiff* testimony? Is not a state Medical Board the one agency (in a position to pursue rogue expert witnesses) which is open to both plaintiff and defendant patients as well as trial lawyers and other doctors who are aggrieved by such testimony? And if, as we believe, it is the dishonest experts who are most likely to be deterred by sanctions, why would this uniquely deprive *plaintiffs* of the

basic tools they need to litigate? We believe it wouldn't. Defense experts are certainly not distinguished for their honesty. We believe some experts provide skewed testimony in a misguided attempt to "even the playing field" (as they envision it), which is a reprehensible reason to enter the expert witness arena. If experts are harder to engage after there are more sanctions and other peer review of more testimony for impartiality, truthfulness and ethicality, then perhaps all litigators will need to be more diligent in the search for more reliable, if less pliable experts.

"NCMB's decision to take away Lustgarten's license was a content-based restriction on speech because it was in response to the content of his testimony in court."

Does freedom of speech confer license to say whatever you like in court with impunity? If Freedom of Speech were a permissible consideration in court testimony, why is there a process of swearing to speak the truth? Even if society might allow for false statements to be made publicly, does not someone serving as an officer of the court (as an expert witness) have an obligation to speak the truth to the tribunal?

We applaud the journal for taking on these issues, rife as they are with ethical implications. We would welcome a continuing discussion of these issues in this journal or on our website in any of the open Forums.<sup>12</sup>

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<sup>1</sup> *The Journal of Philosophy, Science & Law*, Vol. 4, Dec. 7, 2004, at <http://www.psljournal.com/archives/all/punishing.cfm>

<sup>2</sup> <http://www.ccemt.org>

<sup>3</sup> "Dr. Lustgarten testified, in the absence of any corroborating evidence and in spite of evidence to the contrary, that a physician falsified medical records to protect his associate." Transcript of Hearing, *In re Gary James Lustgarten, M.D.*, July 19, 2002, at 7-9.

<sup>4</sup> See, e.g., D. Bernstein, "Improving the qualifications of experts in medical malpractice cases," *Law, Probability and Risk* (2002) 1, 9-16, a version of which may be found online at <http://www.law.gmu.edu/faculty/papers/docs/01-24.pdf>.

<sup>5</sup> As one expert on expert evidence puts it, "The confident expert witness is less likely to have been chosen because she is right, than to have been chosen because she is confident whether or not she is right." Samuel R. Gross, 1991 *Wis. L. Rev.* 1113, 1134 (1991), also at [http://www.law-forensic.com/expert\\_evidence.htm](http://www.law-forensic.com/expert_evidence.htm) is an extensive reference on matters relating to expert witness testimony.

<sup>6</sup> Experts whose incomes depend on testimony must learn to satisfy the consumers who buy that testimony; those who do not will not get hired. In some cases experts may distort their views to suit the interests of their clients, perhaps even lie outright, but that is probably not the major problem. Litigants are not likely to choose experts who must lie--they would rather use experts who give helpful testimony and believe it, and such people can usually be found. Gross, at 1132;

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see also S. Moss, "Opinion for Sale: Confessions of an Expert Witness," *Legal Affairs*, March-April 2003, at [http://www.legalaffairs.org/issues/March-April-2003/review\\_marapr03\\_moss.html](http://www.legalaffairs.org/issues/March-April-2003/review_marapr03_moss.html)

<sup>7</sup> 114 Cal. App. 4th 1108 (2003), and discussion of issues at [www.ccemt.org/displayindustryarticle.cfm?articlenbr=19915](http://www.ccemt.org/displayindustryarticle.cfm?articlenbr=19915)

<sup>8</sup> L. B. Andrew, "The Ethical Expert Witness," *Journal of Medical Licensure and Discipline* 89:3, October 2003, page 125, republished by the NCMB Forum Number 4, 2003, page 7, available at <http://www.ccemt.org/displayindustryarticle.cfm?articlenbr=23928>

<sup>9</sup> M.M. Mello, "Of swords and shields: the role of clinical practice guidelines in medical malpractice litigation," 149 U. Pa. L. Rev. 645 (2001).

<sup>10</sup> L. Weiss, "Expert Witness Malpractice Actions: Emerging Trend or Aberration?" *The Practical Litigator*, 27-38, March 2004; Mark Hansen, "Experts are Liable, Too," *ABA Journal*, Nov. 2000; Renee L. Binder, "Liability for the Psychiatrist Expert Witness", *Am. J. Psychiatry* 159:11, Nov. 2002.

<sup>11</sup> 841 S.W. 2d 671 (Mo. 1992).

<sup>12</sup> See <http://www.ccemt.org/forum.cfm>