



Being the Expert Witness

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BEING THE EXPERT WITNESS

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Chapter 1 - General Introduction to Common Law

LAWSUITS

A *lawsuit*, or “suit in law”, is a civil action, as opposed to a criminal one, brought by one party, the *plaintiff*, before a court, seeking equity for damages allegedly suffered at the hands of another, the *defendant*. The damages may be financial loss (known as *pecuniary damages*) and may be real or expected, such as anticipated profits. Or, damages may be injury to a person or damage to a property. Even one’s sense of well-being or loss of companionship can be deemed a *damage* for the purposes of a lawsuit. The court may award *punitive or exemplary damages* if the defendant’s actions were so intentional and so grossly negligent that the actual damages would be little more than a slap on the wrist. If the plaintiff is successful in his suit, he may receive a *judgment* in his favor and a court can provide instructions to enforce a right, award damages, or prevent further action by injunction. The conduct of a lawsuit is called *litigation* and the place in which this lawsuit takes place is called the *venue*.

A *claim*, in American legal parlance, refers to one of the counts or causes of action, of which there may be several within the one lawsuit and listed in the *pleading*. In other uses, the word ‘claim’ may refer to a demand filed with an insurance company for benefits under an insurance policy. Here in this study we will use the legal definition and not the insurance usage.

Of course, a lawsuit can be brought by individuals, partnerships, business entities or even non-profit corporations, and, as we have seen in our own country, a lawsuit can be initiated by government body. A lawsuit can include dozens of plaintiffs, for example a class action lawsuit, and it can include dozens of defendants. If confusion is what you seek, defendants can file cross actions against the original plaintiffs. For example, an engineer could sue a developer for collection of his fees and the developer could file a cross action for negligent preparation of plans and specifications. A defendant who counter-sues the plaintiff in a lawsuit becomes the cross-plaintiff and the plaintiff becomes the cross-defendant. Plaintiffs and defendants need not be alive. Their *estates* can sue one another.

TRIAL BY JURY

Since the first dispute between humans arose, some system of deciding who was right and who was wrong has existed. Initially, it was fairly simple. If you thought I was being unfair, oppressive or otherwise obstinate you could attempt to bash in my brains to seek equity. Later, humans became a little more civil. We decided on trial by ordeal. For example, in the early history of the U.S., if you were accused of being a witch, the court could throw you into a pond and if you drowned, you were NOT a witch.

Somewhere along the line we became sufficiently civilized to develop trials by jury of our peers. In ancient Greece, the jury (some 501 persons in small matters up to 1,501 in criminal trials involving capital punishment) decided the fate of the accused. The jurors would throw spindles into a circle. A hollow spindle meant not guilty and a solid spindle meant guilty. Of course, the other jurors could not see how any of their peers voted because you could conceal the spindle while you tossed it. Unanimous verdicts were rare. Usually only a majority vote determined guilt or innocence. How sad would it be to lose your life over one or two spindles!

Jury trials emerged in Rome, survived the Dark Ages, and spread to Europe including England. They were used to settle not only criminal cases but the most mundane of civil disputes as well probably during the Norman Conquest of England. The Magna Carta and eventually the U.S. Constitution proclaimed a man's right to a fair trial for criminal cases and the 5th, 6th and 7th amendments to the Constitution extended the right of a trial by jury.

WikiAnswers at www.answers.com claims this year (2010) there will be over 1.4 million lawsuits filed in California alone. Over 7 million "slip and fall lawsuits" will be filed in the U.S. by some estimates and that same source says the number of cases settled out of court in the U.S. is estimated at 85% to 90%. Try doing an internet search of the number of civil suits filed in the U.S. this year and you will likely be unsuccessful in finding any answers other than some educated guesses.

Even with all these lawsuits being filed only some 150,000 jury trials are held in the various state courts within the U.S. each year plus another 5,000 or so are conducted within the federal court system. Of these trials, approximately 2/3 are criminal cases and the remaining 1/3 are civil cases.

Not everyone believes as strongly as we Americans do in the jury trial system. Trial by jury is not allowed in India, Pakistan, or Malaysia for example. Partly this stems from the diversity of their cultures and partly from the history of their legal system. Finding a jury of one's peers in a jury pool of five or ten different ethnicities which in turn constitute large but minority populations within the culture could be troubling. Japan, India and several other nations, argue that it is above the experience and understanding of the common man to make such difficult decisions and these nations choose to have trials by tribunal or by judges, without juries, what in America would be called a *bench trial*. Bench trials can be held in the U.S. in lieu of jury trials and may be preferable in some cases. However, plaintiff attorneys generally favor putting their cases in the hands of a jury.

Certainly juries are not infallible. Witness the strange decisions, some involving extravagant awards, for slips and falls on hairline cracks in the sidewalk, for hot coffee spilled into ones lap at the drive through, or where the plaintiff fails to heed warning signs and drives through a construction zone in a drunken stupor. In most cases, the jury gets it right. Lawyers know which regions of the country are predisposed to render large monetary judgments for the plaintiffs in certain types of cases. Indeed, numerous national

television network exposés in recent years have uncovered the unfortunate practice of *venue shopping*, that is, locating the most favorable court in the land for filing a particular type of case, usually a case having to do with wrongful death, hazardous products, or patent infringements. Some states have attempted to rein in that practice and limit venue shopping as a means of achieving unusually large monetary settlements or judgments. The jury system is not infallible by any means. It is, however, all we have in the U.S. We will have to make do.

Common law is derived through the case law of courts and judges rather than from legislation from the king or congress. Each case brought to court has the potential at least of clarifying or even modifying common law. Attorneys will cite precedence in previous court cases to plead their arguments. Sometimes common law verdicts by juries will incite legislatures to act to limit future awards in similar cases. In most civil cases, the judge will cite the law statutes, leaving it to the jury to decide the facts as they apply to the law. Juries have been known at times to ‘create law’ or at least interpret the facts creatively and certainly their decisions become case law for the next related lawsuit.

You may hear the term “*tort*” with regards to the claims of one party against another in a lawsuit. A *tort* is defined simply as the breach of a duty of one party owed to another but does not include breach of contract. It would include product liability, auto accidents, trespass, unlawful taking of land, and the like. The jury decision then in a court case would be whether one party was negligent in its performance toward another, *negligence* being decided if one party failed to exercise a reasonable *standard of care*. A standard of care as determined by the jury, is owed by one party to the other and if such standard of care is ignored in whole or in part, it gives rise to damages. It is this standard of care that the expert witness will likely address in depositions and courtroom testimony. It is the role of the expert to help the jury to understand what the expected and reasonable standard of care really is.

THE WITNESSES

Once the lawsuit is initiated, both plaintiff and defendant through their attorneys will seek out witnesses. A witness of an event or conditions leading up to an event would be a *factual witness*. The factual witness tells generally what they saw but do not generally offer professional opinions. They can state clearly they saw a bridge fall into the river but do not offer opinions of cause. A reluctant factual witness can be subpoenaed (summoned by the court) to testify even against his will. Factual witnesses are not compensated for their time in court.

A witness with special knowledge or training in subject matter having a bearing on the case would be an *expert witness*. The expert usually has not seen the event or conditions but rather reviewed the aftermath such as the aforementioned collapsed bridge in the river. However, even not having seen the collapse, the expert witness may have specific knowledge of bridges and collapses, knowledge that bears on the cause of the failure and may offer his or her opinion of the causes. That information could help a jury make up its mind as to the person or persons responsible for the collapse and how much the victims

should be compensated. An expert witness cannot be subpoenaed under most circumstances.

While the difference seems obvious, a prospective witness needs to be certain he or she knows where they stand with respect to *factual* or *expert*. Attorney's seeking out witnesses, on occasion fail to clearly state why they want you in particular. One clear indication of one's status is that factual witnesses are not paid to appear in court while experts are compensated for their time in researching and preparing their opinion and testifying in court.

It is this *expert* witness which will concern us for the rest of this study. Know the difference but be the *expert* when you can. It at least pays for your time!

ROLE OF THE EXPERT WITNESS

In times past, the expert witness was simply the *amici curiae*, friend of the court, willingly taking time to present facts and opinions to aid the cause of justice. A judge would even solicit the services of an expert in complex trials to better present the evidence to the jury. But in recent times, experts have been called upon by attorneys to do far more than just appear at trial. Nowadays, experts are brought in early to:

- Ascertain proportional fault
- List possible additional parties to the suit
- Calculate the value of damages
- Help develop strategies for the litigation team
- Critique the other side's expert and his or her reports
- Provide questions to attorneys for interrogatories, deposition and trial
- Create exhibits and visual aids for trial

As a result, the court's perception of the expert witness, having previously been long considered friend of the court, has now evolved into a member of the legal team and a potentially partisan one at that. That role reversal has begun to change the liability exposure for the expert. Heretofore the expert was granted *absolute immunity* for his testimony. Neither unhappy party in a lawsuit, plaintiff nor defendant, could pursue the expert in a separate lawsuit for anything the expert said from the witness stand. This immunity obviously afforded protection against harassment claims or threats of claims by litigants which, when carried to extremes, would obviously affect an expert witness's objectivity.

With the evolution of the expert from a neutral witness role to an actual member of the legal team has come an eroding of the witness *immunity principle*. Some states still observe the principle but, in a number of cases in recent history, engineers have been accused of "*witness malpractice*". Just as is the case with other alleged professional malpractice, the courts, particularly some state courts in New Jersey, California, Texas, Missouri, and Pennsylvania have begun to distinguish between independent expert witnesses giving testimony and experts expressly hired for trial preparation.

In *Murphy v. A. A. Mathews*, 841 S.W. 3d 671, the Missouri Supreme Court held that immunity should only apply to defamation and retaliatory actions against experts. The court further held that experts who provided litigation-related services negligently should NOT be covered by witness immunity.

In Pennsylvania the court decided that an expert hired to calculate lost profits from a real estate venture could be sued for negligence when he erred in those calculations.

In New Jersey in *Levine v Wiss and Company*, the court held that even a court appointed expert could be sued for negligence. The court accepted the prevailing view that an expert who provides litigation-related services is not entitled to witness immunity.

You should be able to sue your expert for negligence. You should not be able to sue your expert for defamation or retaliation. You should be able to sue your expert for negligence.

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