J. Michael Riley

Practice Pointer

Curbing Defense Medical Evaluations

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The Problem

There was a time when defense medical evaluations were reasonably objective, albeit conservative. They were also a relative rarity because the defense ran the risk of an adverse opinion. Those days are gone.

Over the years insurers have developed a reliable stable of hired gun "experts". These doctors churn out predictable opinions that support the company line. They are most prominent in soft tissue and chronic pain cases, where they consistently opine that everyone recovers within a relatively brief period of an injury.

The statute concerning medical evaluations, Section 804.10(1), is part of the Wisconsin Statutes governing discovery. The purpose of those statutes is to serve the ends of justice and increase the chances for settlement. *Dudek v. Circuit Court for Milwaukee County*.[1] What we have at present is a group of well-paid advocates posing as "independent experts." They provide cookie cutter opinions which do far more to obstruct than promote settlement and further the interests of their masters, not the ends of justice.

This article is focused on the hired gun medical expert. While some of the arguments advanced may have broader application, they are most likely to be effective in that context.

Insurers seem to assume that a defense medical evaluation is a matter of right. That assumption has gone largely unchallenged, although some efforts have been made to place conditions on examinations. We believe a more fundamental challenge is justified.

Suggested Solution

A. Section 804.10(1)

Far from providing a carte blanche right to defendants, Section 804.10(1) grants the court discretion to order an examination on "good cause shown". Absent a stipulation, the burden to justify a medical evaluation rests with the defense.

Section 804.10(1) also rests with the courts. It also affords the court control over the time, place, manner, and scope of any examination. Significantly, the section also permits the court to determine the person or persons by whom an evaluation is to be conducted.

The case law interpreting Section 804.10(1) is limited. Significantly what constitutes "for cause shown" was addressed in *Ranft v. Lyons*.[2] In denying the request for an evaluation, the court held that the requesting party would need to demonstrate cause beyond the threshold requirement that the party's physical condition be at issue. Citing to *Schlagenhauf v. Holder*[3] the court noted that under a similar federal rule the U.S. Supreme Court had concluded that an examination might not be appropriate if the opposing party could obtain the desired information by other means.

The fundamental purpose of the discovery statutes, coupled with the requirement of Section 804.10(1) provide a sound basis for challenging or limiting the defense right to a medical evaluation. The argument is particularly compelling when it can be demonstrated that the defense is proposing that the evaluation be conducted by one of the relative handful of well-paid advocates who conduct a majority of the defense evaluations. They routinely issue opinions which are both scientifically categorical and essentially identical in case after case.

Presenting the court with evidence that the proposed expert is little more than a hired gun is critical. Evidence can be obtained through discovery. That will almost certainly show that the expert has completed a large number of evaluations on behalf of the defense and has consistently produced opinions that do not vary materially from case to case. That is so despite significant differences among a variety of plaintiffs. Prior opinions will also disclose that the proposed defense medical expert consistently disagrees with the opinions of a broad range of treating physicians.

It may also be worth pointing out that in opinion after opinion these doctors rely heavily upon medical records. Their opinions are also predicated upon what is essentially an article of faith, that everyone who is injured in an accident recovers rapidly. At the same time, they essentially ignore the history offered to them by the plaintiff in the course of these examinations.

Under all of those circumstances it is difficult to see that permitting an evaluation by someone who is more advocate than expert can promote the ends of justice or meet the for cause standard set forth in Section 804.10(1).

B. Docs and *Daubert*

We believe there is also a compelling case to be made that the opinions consistently offered by many of the best known defense medical advocates does not pass muster under the *Daubert* standards. In *Daubert* v. *Merrell Dow Pharm., Inc.*[4] and its progeny, the U.S. Supreme Court sought to eliminate junk science from the courtroom. The court was concerned that advocacy masquerading as science could be used to confuse jurors in cases involving technical issues. As anyone knows who has handled medical malpractice cases, jurors are all too readily confused by conflicting medical opinions, regardless of their merit.

Daubert and the subsequent cases interpreting it set forth a number of criteria for determining whether proposed expert testimony passes muster. Several of those criteria apply with particular force to the standard hired gun medical opinion.

First and foremost, courts should concern themselves with whether the theory underlying the expert's opinion enjoys broad acceptance within the relevant scientific community. The often repeated opinion that everyone heals within 12 to 18 weeks, does not enjoy such acceptance. In fact, that categorical opinion is contradicted in case after case by a variety of treating physicians. Defense experts almost

uniformly disregard those opinions and the well accepted reality that long term chronic pain is a common sequelae of neck and back injuries.

Daubert also asks whether the theory or technique underlying an opinion has been subjected to peer review and publication. There is no peer reviewed literature we are aware of which supports the categorical opinion that everyone recovers from soft tissue injuries within a given timeframe regardless of the severity of the injury, the nature of the plaintiff, or the manner in which the injury occurred.

Testimony which is based on testing that was conducted for purposes of litigation is also highly suspect under *Daubert*. Some defense experts rely on tests conducted by the insurance industry specifically for the purposes of litigation.

Ultimately, *Daubert* requires that an expert opinion be grounded in the scientific method. It rejects the use of *ipse dixit* (it is so because I say it is so) testimony. In the case of many medical experts, the opinions offered are not based on a scientific analysis of the evidence presented, but rather on a categorical and scientifically unsupported belief.

Case law applying *Daubert* to medical testimony is sparse. Wisconsin's appellate courts have not addressed the issue directly, although there is at least one Wisconsin decision that discussed the suspect nature of *ipse dixit* testimony in evaluating the admissibility of nonmedical testimony.

The federal courts have held that *Daubert* can be applied to medical testimony. In *Bowers v. Norfolk*[5] the court rejected testimony by a physician hired by a third party because it felt there was insufficient indicia of reliability. The proposed testimony concerned an unusually complex causation issue. The court based its rejection on the fact that the opinions had not been peer reviewed, were not supported by medical literature and were not demonstrated to have general acceptance in the medical community.

The precise concerns articulated in *Bowers* apply to the standard hired gun medical opinions. What *Daubert* and *Bowers* condemn is the effort to convert science into a partisan smokescreen. Defense medical opinions which consistently contradict treating physicians and ignore real world medical experience have precisely that affect.

Wisconsin has not specifically applied *Daubert* to medical testimony. The Wisconsin Court of Appeals has expressly rejected *ipse dixit* testimony in *State v. Giese*.[6] The court noted *ipse dixit* testimony is barred because it contains none of the indicia of reliability that *Daubert* requires. The U.S. Supreme Court had previously stated in *Kumho*, *supra*, that "nothing in either *Daubert* or the Federal Rules of Evidence requires a District Court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." The opinions most commonly offered by defense medical experts are classic *ipse dixit* testimony. They rest on nothing more than the expert's assertion that the categorical opinion he offers is true because he says it is true.

One obviously related question is whether testimony by treating physicians may also run afoul of *Daubert*. In general, we believe not.

In *Cooper v. Carl A. Nelson & Co*.[7] the 7th Circuit Court of Appeals rejected a challenge to testimony by a treating physician. The defense challenged proposed testimony by the plaintiff's pain specialist linking the plaintiff's chronic pain syndrome to trauma sustained in the accident. The physician had testified based on his examination of the plaintiff as well as plaintiff's reported medical history. The trial court initially rejected the testimony because it was based on history which the defense asserted was inaccurate.

The Court of Appeals rejected the defense argument, concluding it would establish an overly demanding gatekeeper role. The court observed that it was not seriously disputed that in clinical medicine the methodology of physical examination and self-reported medical history employed by the plaintiff's expert was generally acceptable. The defense argued that the approach was not acceptable where the etiology of a condition was well established. The court rejected that argument noting the defense suggested no alternative that could be employed by a conscientious clinical physician.

The court cited *United States v. Lunde*[8] as recognizing a wide choice of methodologies that may be used in developing an expert opinion. In conclusion, the court held that the physician had employed the accepted diagnostic tool of examination accompanied by physical history as related by the patient. The case was returned to the trial court with instructions to follow the court's direction in determining admissibility.

Ultimately, the court concluded that arguments concerning alternative possibilities were susceptible to exploration on cross-examination. The court took the same approach to disputes relating to the patient's medical history.

Cooper is quite consistent with the approach taken by Wisconsin courts prior to *Daubert*. We anticipate the Wisconsin courts following a similar course post *Daubert* with respect to clinical opinions by treating physicians.

So why would our courts be less receptive to defense medical experts? There are fundamental differences between the testimony offered by treating physicians and that offered by hired gun defense medical experts. Treating physicians give opinions specific to a particular case based on a patient's history, their clinical examination of the patient, and their experience with similar patients and similar conditions. The opinions vary from patient to patient. At least treating physicians can attest that a patient's recovery or lack of recovery can be impacted by a variety of factors relating both to the patient and to how they were injured.

Defense medical experts, by contrast, offer opinions predicated on categorical belief that everyone who has sustained certain types of injuries recovers within a defined and relatively brief period. That categorical approach is at direct odds to opinions held by the majority of the medical community. It is also unsupported by literature, or indeed by logic.

Hired gun medical experts are not offering testimony rooted in the reality that human beings are not machines, but rather are infinitely variable. They offer categorical opinions that are rooted neither in sound medical theory or science. Those are precisely the sort of one size fits all partisan opinions that *Daubert* condemned. If such testimony cannot withstand scrutiny under *Daubert*, there is no reason for the court to permit an evaluation intended merely to bolster testimony which would violate the strictures of *Daubert*.

It would be much neater if there were clear cut answers as to how challenges to defense medical experts will play out. That said, we believe there are strong arguments

under Section 804.10(1) and *Daubert* to object to the use of hired gun defense doctors. While such challenges are not appropriate in every case, we believe it is time that an effort was made to rein in what has become a destructive phenomenon. To paraphrase, we can't know what we'll get, but we know what we've got. Hired gun doctors present a real impediment to obtaining fair compensation for our clients. Allowing them to continue unchecked seems a poor option.

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(Endnotes)

[1] 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
[2] 163 Wis. 2d 282, 471 N.W.2d 274, *review denied* 475 N.W.2d 584 (1991).
[3] 379 U.S. 104, 117-122 (1964).
[4] 509 U.S. 579 (1993).
[5] 537 F. Supp. 2d 1343 (M.D. GA 2007).
[6] 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687.
[7] 211 F.3d 1008 (2000).
[8] 809 F.2d 392, 395-6 (7th Cir. 1987).