SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 652 (Umberg)
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Fiscal: No
Urgency: No
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SUBJECT

Evidence: expert testimony

DIGEST

This bill requires experts' testimony in the form of an opinion to be based on a standard of a reasonable degree of probability in their field of expertise in which they are offered as an expert.

EXECUTIVE SUMMARY

It is generally accepted that the testimony of experts is given increased weight by triers of fact in civil litigation, especially with juries. Because experts can only offer their opinion testimony when it relates to a subject that is "sufficiently beyond common experience" that the opinion would assist the trier of fact, inherently the topic is something that the jury cannot properly establish their own basis for determination without the expert's assistance.

Given this, California statutory law provides strict guidelines for who can qualify as an expert and what they can testify about. One of these guidelines has come into question after a recent California Court of Appeal opinion in *Kline v. Zimmer, Inc.* (2022) 79 Cal. App. 5th 123 ("*Kline*"). It is well established that in personal injury actions that causation must be proven "within a reasonable medical probability based upon competent expert testimony." The *Kline* Court found that the reasonable medical probability requirement only applies to the party bearing the burden of proof on the underlying issue. The Consumer Attorneys of California, the sponsors of the bill, point to previous case law and contend that this is an "errant court decision" that will upend the credibility of expert witness testimony. This bill abrogates *Kline* and makes clear that all expert witness opinion testimony must be based on a reasonable degree of probability in the expert's field of expertise. The bill is sponsored by the Consumer Attorneys of California and supported by the Brain Injury Association of California. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that a person is qualified to testify as an expert if the person has special knowledge, skill, experience, training, or education sufficient to qualify the person as an expert on the subject to which the testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. (Evid. Code § 720(a).)

2) Permits a witness' special knowledge, skill, experience, training, or education to be shown by any otherwise admissible evidence, including the witness' own testimony. (Evid. Code § 720(b).)

3) Provides that if a witness is testifying as an expert, their testimony in the form of an opinion is limited to such an opinion as is:
    a) related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
    b) based on matter (including the expert's special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which the expert's testimony relates, unless an expert is precluded by law from using such matter as a basis for their opinion. (Evid. Code § 801.)

4) Provides that a witness testifying in the form of an opinion may state on direct examination the reasons for its opinion and the matter (including, in the case of an expert, its special knowledge, skill, experience, training, and education) upon which it is based, unless the expert is precluded by law from using such reasons or matter as a basis for their opinion. The court, in its discretion, may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which their opinion is based. (Evid. Code § 802.)

5) Provides that the court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such cases, the witness may, if there remains a proper basis for their opinion, then state their opinion after excluding from consideration the matter determined to be improper. (Evid. Code § 803.)

6) Authorizes an expert witness to be cross-examined to the same extent as any other witness and to be fully cross-examined as to qualifications, the subject to which the expert testimony relates, and the matter upon which the opinion is

> based and the reasons for it. The law places limits on such cross-examination in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication. (Evid. Code § 721.)

This bill requires expert testimony in the form of an opinion, in a civil case, to be based on a standard of a reasonable degree of probability in the expert's field of expertise, including, but not limited to, medical, psychological, psychiatric, scientific, engineering, or other applicable field in which they are offered as an expert.

COMMENTS

1. Expert witnesses

Given the importance of expert testimony in civil cases, the California Evidence Code lays out strict guidelines for who may qualify as an expert, what matters they can testify upon, and what specifically they can testify to. To qualify as an expert, a person must have special knowledge, skill, experience, training, or education sufficient to qualify the person as an expert on the specific subject to which the ultimate testimony relates.[1] Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. This special knowledge, skill, experience, training, or education can be shown by any otherwise admissible evidence, including the expert's own testimony.[2]

If a witness is testifying as an expert, the expert's testimony in the form of an opinion is strictly limited. First, such testimony must be related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.[3] In other words, if the ultimate trier of fact, judge or jury, is able to draw a conclusion from the facts presented as easily and as intelligibly as an expert could, expert testimony is improper and not admissible.[4]

In addition, the expert's opinion testimony must be based on matter perceived by or personally known to the witness or made known to them at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which the testimony relates, unless the law precludes it.[5]

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[1] Evid. Code § 720(a).
[2] Evid. Code § 720(b).
[3] Evid. Code § 801(a).
[4] *See Romine v. Johnson Controls, Inc.* (2014) 224 Cal. App. 4th 990, 1001 ("if the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer should expect"); *Knutson v. Foster* (2018) 25 Cal. App. 5th 1075, 1097 (finding the emotional distress to which an expert testified was not beyond the common experience of the jurors).
[5] Evid. Code § 801(b).

2. *Kline* and a reasonable degree of probability

The issue underlying this legislation is the standard that applies to expert testimony. It is well-accepted under state law that causation in personal injury actions must be established to a reasonable probability based on competent expert testimony:

> The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. That there is a distinction between a reasonable medical "probability" and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.[6]

As mentioned, the California Court of Appeal in *Kline* weighed in on the issue of whether a different standard applies to a defendant's expert attempting to rebut the plaintiff's evidence. In *Kline*, the plaintiff brought a personal injury action against the defendant medical device manufacturer for injuries sustained after implantation of an artificial joint that allegedly caused plaintiff's injuries. After a verdict was entered in favor of the plaintiff, the defendant appealed the trial court's denial of a motion for a retrial. Relevant here, the defendant argued that one basis for retrial was the trial court's exclusion of expert testimony offered by the defendant on the grounds that it was offered to less than a reasonable medical probability.

The appellate court began by establishing the standard that all parties agreed applied to plaintiff's expert:

> [B]efore the plaintiff is even entitled to submit his claim to a fact finder, he must make a prima facie case, meaning he must proffer evidence sufficient to permit a finding in his favor. Where causation is "beyond the experience of laymen," as it is in complex medical injury cases, such evidence must be in the form of an expert opinion that could be accepted by the fact finder as satisfying the plaintiff's burden of proof. That opinion must be expressed to "a reasonable medical probability," which, again, means more likely than not, because more likely than not is the threshold level of certainty necessary to prove a personal injury claim.

[6] *Jones v. Ortho Pharm. Corp.*, (1985) 163 Cal. App. 3d 396, 402-03 (internal citations omitted).

> Thus, testimony by a plaintiff's expert who cannot opine to a reasonable medical probability is properly excluded because the opinion could not sustain a finding in the plaintiff's favor. The reason for this is clear. To allow a jury to consider a claim where the plaintiff's prima facie showing falls short of reasonable medical probability would be to allow the jury to find the requisite degree of certainty where science cannot: "'If the experts cannot predict probability in these situations, it is difficult to see how courts can expect a jury of laymen to be able to do so.'"[7]

The plaintiff argued, and the trial court agreed, that this same standard applies to a defendant's expert. However, the appellate court differentiated expert testimony seeking to prove an actual alternative cause, rather than simply seeking to introduce causation opinions and other evidence to challenge the causation opinion of the plaintiff's expert. The court found that in the latter situation the same standard does not apply to both sides:

> The same [standard] does not apply to a defendant's efforts to challenge or undermine the plaintiff's prima facie case. Even after the plaintiff has made its prima facie case, the general rule is that the burden to prove causation remains with the plaintiff. And, regardless of whether the defendant produces any evidence at all, it remains for the fact finder to say whether the plaintiff has in fact met its burden to the requisite degree of certainty.[8]

The court asserted that the defendant did not need to show that a different cause was more likely than not the cause of the plaintiff's injuries, rather, the defendant need only show that the plaintiff's evidence was insufficient to prove the injuries were more likely than not caused by the defendant. The court concluded that the defendant "should have been permitted to do so by offering expert opinions offered to less than a reasonable medical probability that [the plaintiff's] injuries may have been attributable to other causes."[9]

It should be noted that the issue is split across the country where dispositive case law or state statutes were found. For its part, the *Kline* court appeared to recognize that the holding represented a change of course: "In so holding, we join state and federal courts from across the country that recognize the reasonable medical probability requirement applies only to the party bearing the burden of proof on the issue which is the subject of the opinion."[10] The *Kline* court supports its holding that defense experts need not meet the reasonable probability standard by pointing to several cases, including *Cahill Bros.*,

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[7] *Kline*, 79 Cal. App. 5th at 131.
[8] *Id*.at 131-132.
[9] *Ibid*.
[10] *Id*. at 132-133 (specifically citing to the United States Court of Appeal for the First Circuit in *Wilder v. Eberhart* (1st Cir. 1992) 977 F.2d 673).

Inc. v. Clementina Co. (1962) 208 Cal.App.2d 367, 385 and *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal. App. 4th 1658, 1668. Those cases specifically addressed the burden of proof not shifting to the defendant, even when the plaintiff establishes a prima facie showing. However, they did not involve expert testimony.

3. Abrogating *Kline*

The author argues that *Kline* disrupts long-standing law in California that held experts from both sides to the same reasonable standard, instead creating an uneven playing field that risks destabilizing the parameters around expert testimony in California courts. According to the author:

> Since expert testimony often carries greater weight than other witnesses, experts must be qualified, and there is an entire body of law governing qualifications of experts and their testimony. California law has long held that both experts, plaintiff and defense, must testify to a reasonable medical probability. However, a recent errant court decision threatens to upend the credibility of expert witness testimony. One isolated court in *Kline v. Zimmer, Inc.* (2022), upends current law by allowing only defense experts to testify to any "possible" cause of injury rather than what "more likely than not" caused an injury. This allows an expert witness to offer any alternative cause for an injury, even when they do not have data, science, or any rationale to support that cause, as long as the action is a "possible" cause for the injury, and not purely speculative.
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> Therefore, SB 652 will clarify and codify longstanding law regarding the standard for expert witness testimony by ensuring that when testifying to a jury, all experts provide their opinion to a reasonable degree of probability.

While Kline created different standards depending on whether a defendant is using the expert testimony to prove an alternative cause or establish an affirmative defense rather than simply provide evidence of the *possibility* of other causes, this bill makes clear what the standard for expert opinion is in the State of California, regardless of the underlying purpose for which it is presented, ensuring reliability in expert testimony.

The Consumer Attorneys of California, the sponsor of this bill, writes:

> Since expert testimony often carries greater weight than other witnesses, experts must be qualified, and there is an entire body of law governing qualifications of experts and their testimony. See Evidence Code § 801. Before an expert is permitted to testify, the lawyer offering an expert goes through the process of qualifying the witness as an expert, including establishing their background, education, training, and experience.

> Evidence Code § 720. Therefore, their testimony should be held up to appropriate scrutiny commensurate with the legal standards regarding foundation, reliability, and admissibility.

The sponsor asserts: "SB 652 will clarify Evidence Code § 801 to ensure all experts must testify to a reasonable degree of probability based on their field of expertise. This would codify the standard that had been consistently relied upon for decades and will ensure only reliable testimony is presented to juries."

It should be noted that the scope of cross-examination of expert witnesses remains the same. Evidence Code section 721 provides that a witness testifying as an expert may be "cross-examined to the same extent as any other witness." In addition, an expert may be fully cross-examined as to their qualifications, the subject to which their expert testimony relates, and the matter upon which their opinion is based and the reasons for their opinion. Therefore, even without their own expert, defendants will continue to be permitted to fully cross-examine any plaintiff expert to challenge the sufficiency of the testimony to meet plaintiff's burden of proof. However, some concerns have been raised that the bill as drafted may improperly interfere with a defense expert's ability to rebut the testimony of a plaintiff's expert. To further ensure this is not the case, the author has agreed to the following amendment:

> Amendment
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> (c) Nothing in subdivision (b) shall preclude a witness testifying as an expert from testifying that a matter cannot meet a reasonable degree of probability in the applicable field, and providing the basis for that opinion.

This bill heightens the bar to which experts will be held to ensure this particularly impactful testimony is reliable and not misleading.

SUPPORT

Consumer Attorneys of California (sponsor)
Brain Injury Association of California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

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