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Expert Testimony on Proximate Cause

*Daniel J. Steinbock**
*William M. Richman***
*Douglas E. Ray****

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I. INTRODUCTION

Expert testimony is common in tort litigation, especially on issues of standard of care and cause-in-fact. Rule 704 of the Federal Rules of Evidence¹ and its state counterparts abolished the prohibition of testimony on ultimate issues, leading to the possibility of expert testimony on the often crucial issue of proximate cause. The situation is easy to imagine. After counsel has qualified an expert witness and elicited an opinion that the particular act or omission “caused” the injury in question, counsel might very well be tempted to inquire whether the witness

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1. FED. R. EVID. 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

has an opinion as to whether the act or omission was a "proximate" or "legal" cause of the accident. Or, counsel may merge the two lines of inquiry and ask whether the act or omission "proximately resulted" in the accident or injury to the plaintiff. The inquiry seems harmless. The term "proximate" is commonly understood to mean only "near" or "close to."² The question is not innocuous, however. The issue of expert testimony on the question of proximate cause implicates several restrictions on expert testimony that survive the broad permission of Rule 704, and touches upon the serious issue of the proper roles of expert and fact-finder in the application of law to facts. The few published cases that have considered the issue of expert testimony on proximate cause are split.³ The question arises far more often, however, than is indicated by the relative scarcity of reported decisions.⁴

This Article addresses the usefulness and propriety of expert testimony on the issue of proximate cause. After briefly defining the concept of proximate cause, this Article argues that expert testimony on proximate cause is inadmissible under Rule 704, despite the general admissibility of testimony on ultimate issues. In addition, opinion on proximate cause is inadmissible because it fails to clear the separate hurdles of Rules 702⁵ and 403⁶ of the Federal Rules of Evidence. A technical expert on standard of care or actual cause is not qualified to opine on the issue of proximate cause and thus fails the expertise test of Rule 702. Furthermore, even the testimony of a genuine expert on the issue of proximate cause should be excluded because such testimony fails the helpfulness test of Rule 702. Finally, expert testimony on the issue of proximate cause is inadmissible under Rule 403 because its probative value is substantially outweighed by the possibility that such tes-

2. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1145 (2d college ed. 1982).

3. Intermediate appellate courts in Ohio have permitted experts to testify in terms of the "proximate cause" of an injury, though the issue in dispute in both cases was the actual cause of the injury. *Brooks v. Piwinski*, No. 47965 (Ohio Ct. App. Nov. 8, 1984); *Fidelity & Guar. Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc.*, 48 Ohio App. 2d 319, 357 N.E.2d 388, 391 (1974). Alabama bars expert testimony on the issue of proximate cause. *Underwood v. Smith*, 261 Ala. 181, 189-90, 73 So. 2d 717, 725 (1954) (proximate cause "is a juridical question, not one of expert knowledge. It involves many questions not of an expert nature, some are legal and some factual"); see also *Thompson v. White*, 274 Ala. 413, 149 So. 2d 797, 803 (1963). The Texas courts prohibit expert testimony on proximate cause on the ground that the question is one for the jury, *Hall v. Birchfield*, 718 S.W.2d 313, 321 (Tex. Ct. App. 1986), and that the term as used by witnesses confusingly implies the legal definition. *Garza v. Berelanga*, 598 S.W.2d 377, 379 (Tex. Civ. App. 1980).

4. See, e.g., Schaefer, *Low-Cost Shadow Juries*, 22 TRIAL, Dec. 1986, at 58.

5. FED. R. EVID. 702 (governing the testimony of experts); see *infra* notes 56-95 & 103-10 and accompanying text.

6. FED. R. EVID. 403 (allowing judge to exclude relevant evidence on grounds of prejudice, confusion, or waste of time); see *infra* notes 96-110 and accompanying text.

timony will confuse the issues and mislead the jury.

II. THE NATURE OF THE PROXIMATE CAUSE INQUIRY

To understand the relevance of expert testimony to the issue of proximate or legal cause,⁷ some background is necessary. On the surface, the topic does not sound difficult. The terms "proximate" and "cause" are not unusual or difficult terms. In practice, however, the concept of proximate cause has little to do with proximity.⁸ Furthermore, it is difficult to define and even more difficult to apply. A respected commentator has described proximate cause issues as "notoriously difficult,"⁹ and the leading treatise describes the concept as "something that is difficult, if not impossible, to put into words."¹⁰ Courts, too, have recognized the difficulty of the subject of proximate cause. As the New York Court of Appeals stated: "The concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations."¹¹

7. The *Restatement (Second) of Torts* has substituted the term "legal cause" for the term "proximate cause" in an attempt to limit confusion. RESTATEMENT (SECOND) OF TORTS § 431 (1977). As stated by the Court of Appeals for the First Circuit in *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955) (citations omitted):

The adjective "proximate," as commonly used in this connection is perhaps misleading, since to establish liability it is not necessarily true that the defendant's culpable act must be shown to have been the next or immediate cause of the plaintiff's injury. In many familiar instances, the defendant's act may be more remote in the chain of events; and the plaintiff's injury may more immediately have been caused by an intervening force of nature, or an intervening act of a third person whether culpable or not, or even an act by the plaintiff bringing himself in contact with the dangerous situation resulting from the defendant's negligence. . . . Therefore, perhaps, the phrase "legal cause," as used in Am.L.Inst., Rest. of Torts § 431, is preferable to "proximate cause"; but the courts continue generally to use "proximate cause", and it is pretty well-understood what is meant.

The issue of proximate cause occupies a significant place in torts casebooks. See, e.g., G. CHRISTIE, *CASES AND MATERIALS ON THE LAW OF TORTS* 264-328 (1983); D. DOBBS, *TORTS AND COMPENSATION* 197-231 (1985); R. EPSTEIN, C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 309-49 (4th ed. 1984); M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 239-83 (4th ed. 1987); L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, *TORTS, CASES AND MATERIALS* 348-49, 595-600, 610-13, 674-79 (2d ed. 1977) [hereinafter L. GREEN]; J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 506-61, 763-65 (2d ed. 1981); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 299-380 (7th ed. 1982) [hereinafter W. PROSSER].

8. As Professor Robert Keeton has noted in stating his preference for the term "legal cause": "Many others, especially at the bench and bar, prefer to use the phrase 'proximate cause.' I offer no protest against their practice so long as there is common recognition that 'proximate cause' is a phrase of art and that proximity is not the point." R. KEETON, *LEGAL CAUSE IN THE LAW OF TORT* viii (1963).

9. D. DOBBS, *supra* note 7, at 220.

10. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 300 (5th ed. 1984) [hereinafter PROSSER & KEETON].

11. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 314, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169, (N.Y. Ct. App. 1980).

Similarly, the Supreme Court of Minnesota noted that "[t]here is no subject in the field of law upon which more has been written with less elucidation than that of proximate cause."¹²

The precise meaning of "proximate cause" is of particular importance because, in most jurisdictions, the jury decides the question of the proximate or legal cause of an injury, an issue that can be outcome determinative. If the jury determines that the defendant was negligent in his or her conduct and that the negligence actually caused some injury to another party, the inquiry then shifts to whether the defendant should be legally responsible for the harm or injury caused to the plaintiff.¹³ In effect the jury is being asked to apply "policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct."¹⁴ This stems from a "wide-spread conviction," noted by the United States Court of Appeals for the First Circuit, that "it would be disproportionately burdensome to hold a culpable actor potentially liable for all the injurious consequences that may flow from his act, i.e., that would not have been inflicted 'but for' the occurrence of the act."¹⁵

To perform this limiting function, the jury is most often asked to determine the issue of proximate cause by using the concept of foreseeability. Under this approach, the liability of a negligent actor is confined to those consequences that would have been foreseeable to a reasonably prudent person at the time the actor took the action or inaction which rendered him or her negligent.¹⁶ In other words, the defendant is liable only if the consequences fall within the range of results that were foreseeable at the time of the defendant's action. In making this determination, the jury will have to determine, first, whether the plaintiff was a foreseeable plaintiff, i.e., was he or she within the scope of the foreseeable risk created by defendant's conduct,¹⁷ and, second,

12. *Dellwo v. Pearson*, 259 Minn. 452, 453, 107 N.W.2d 859, 860 (1961).

13. PROSSER & KEETON, *supra* note 10, at 264, 320-21.

14. *Derdiarian*, 51 N.Y.2d at 314, 414 N.E.2d at 670, 434 N.Y.S.2d at 169.

15. *Marshall*, 222 F.2d at 610.

16. The traditional proximate cause analysis with its focus on foreseeability is discussed in R. KEETON, *supra* note 8, at 41-45. Others advocate a duty-risk analysis in which foreseeability is not linked to cause analysis but rather is used only as a factor to help determine duty and negligence. See Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 570-72 (1962); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); see also Probert, *Causation in the Negligence Jargon: A Plea for Balanced "Realism,"* 18 U. FLA. L. REV. 369 (1965); Thode, *Tort Analysis: Duty-Risk Versus Proximate Cause, and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1.

17. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). Judge Benjamin Cardozo's opinion in *Palsgraf* is viewed as "the most renowned exposition of the theory that a negligent defendant is not liable to persons outside the range of reasonably foreseeable harm." R. KEETON, *supra* note 8, at 119. As Professor Keeton noted, "[S]ince the rendition of the *Palsgraf*

whether the occurrence itself, the way in which plaintiff was harmed, was within the scope of foreseeable consequences.¹⁸ While not all jurisdictions apply the foreseeability theory to issues of proximate cause, it is considered the dominant view.¹⁹ For purposes of this Article, jurisdictions applying the foreseeability test are the most relevant because the foreseeability approach results in resolution of most proximate cause issues by the trier of fact.²⁰

In those jurisdictions adopting the foreseeability approach, the jury is instructed to determine what the defendant did foresee or should have foreseen. For example, model jury instructions used in Nebraska provide:

By "proximate cause" is meant a moving or effective cause or fault which, in a natural and continuous sequence (unbroken by an efficient intervening cause), produces the (harm, accident, injury, collision, occurrence) which otherwise would not

decision in 1928, hundreds of judges and commentators and thousands of students and lawyers have spent millions of hours in the communication of billions of thoughts about the *Palsgraf* problem." *Id.* at 120.

18. *See, e.g.*, *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964). In a now classic opinion, Judge Henry Friendly discussed the foreseeability issue and held that the foreseeability of danger test for liability was satisfied when the damage was caused by the very forces—current, ice, and size of the ship—that created a duty to take greater care than was taken in tying up the ship. *Id.* at 723-25. Foreseeable damages are compensable even if they occur in a somewhat unforeseeable manner. Furthermore, in personal injury cases, courts long have held that the defendant takes the plaintiff as he finds him and is responsible for the full extent of an injury, even though the plaintiff was a particularly susceptible individual due to some pre-existing condition. PROSSER & KEETON, *supra* note 10, at 291-93.

19. PROSSER & KEETON, *supra* note 10, at 297. The Supreme Court of Minnesota, however, rejected the foreseeability test in *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961). In *Dellwo* the defendant's motor boat crossed and snagged the plaintiff's fishing line, pulling down the plaintiff's fishing rod. The fishing reel broke on the side of the boat and part of the reel struck the plaintiff in the eye. In overturning a verdict for the defendant, the court ruled that the trial court erred in making foreseeability a test of proximate cause. Quoting *Christianson v. Chicago, St. P. M. & O. Ry. Co.*, 67 Minn. 94, 96, 69 N.W. 640, 641 (1896), the court stated:

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.

Dellwo, 259 Minn. at 455-56, 107 N.W.2d at 861-62. In summary, the court stated that "negligence is tested by foresight but proximate cause is determined by hindsight." *Id.* at 456, 107 N.W.2d at 862.

20. J. HENDERSON & R. PEARSON, *supra* note 7, at 509.

have occurred.

A "proximate result" is that result brought about or produced by a proximate cause. It must have been a natural and probable consequence which was, or ought to have been, reasonably foreseen or anticipated in the light of attendant circumstances. (It is not required, however, that the particular [harm, accident, injury, collision, occurrence], or the precise nature and extent thereof, or the exact manner of its happening, was or should have been foreseen.)²¹

Similarly, model jury instructions used in Texas provide, in part, that "in order to be a proximate cause the act or omission complained of must be such that a person using ordinary care would have foreseen the event, or some similar event, which might reasonably result therefrom."²²

The question must be asked, however, whether the jury can understand these instructions and the role it is to perform. To understand the issue of proximate cause, if any person can, a juror would have to be given a far more thorough indoctrination in the law than provided by the above instructions. As Professor Leon Green has asked: "[c]an a jury be given a law school education concerning the various policies that should be considered? Should it be done?"²³ The problem, of course, is that more words will not necessarily lead to more understanding.²⁴ As Professor Page Keeton has described the process, the jury is being asked to perform an "evaluative determination" whereby it applies the legal standard of foreseeability to the determined facts.²⁵ Under this view, the jury resolves two kinds of questions if reasonable persons could disagree about them: first, the traditional fact question and, second, the evaluative application of legal standards to the facts.²⁶

In summary, the law of proximate cause is neither uniform nor clear. Despite widespread agreement on the complexity of the subject, juries routinely are instructed to determine whether the defendant's conduct was the "proximate cause" of the plaintiff's injury, even though

21. Nebraska Jury Instructions 3.41 (1969), *reprinted in* W. PROSSER, *supra* note 7, at 369.

22. Texas Pattern Jury Charge § 203, *reprinted in* W. PROSSER, *supra* note 7, at 370; *see* Marshall v. Joske's, Inc., 581 S.W.2d 192, 194 (Tex. Civ. App. 1979) (indicating that "[u]nder Texas law, proximate cause consists of two elements, which are cause in fact and foreseeability").

23. L. GREEN, *supra* note 7, at 678.

24. In discussing an Oregon jury instruction that defined proximate cause as occurring when the damage "is the natural or probable result of the negligence and such as might have been reasonably foreseen as leading to damage of the general nature claimed in this case," Justice Alfred Goodwin noted that the "instruction is talking about ultimate legal liability—not about causation. The jury, however, is not in on this secret. It is invited to think about causation." Stoneburner v. Greyhound Corp., 232 Or. 567, 575, 375 P.2d 812, 816 (Or. 1962) (Goodwin, J., specially concurring).

25. PROSSER & KEETON, *supra* note 10, at 320. Professor Monaghan divides this process into two stages: norm elaboration and law application. *See infra* text accompanying notes 74-95.

26. PROSSER & KEETON, *supra* note 10, at 320.

the concept involves neither "proximity"²⁷ nor "cause."²⁸ It is important to keep these considerations in mind when determining how the rules of evidence should apply to expert testimony that purports to advise the jury on the subject of proximate cause.

III. ADMISSIBILITY UNDER RULE 704: TESTIMONY ON AN ULTIMATE ISSUE

Prior to abolition of the rule excluding testimony as to ultimate issues, expert opinion on the issue of proximate cause would have been excluded as a matter of course. The rule, which developed in American courts in the nineteenth century, excluded lay or expert opinion upon an ultimate issue on the ground that such an opinion "invaded the province of the jury" or "usurped the function of the jury."²⁹ The rule and its formalistic rationale were condemned by the classical commentators.³⁰ Wigmore, for example, termed the rule "a bit of empty rhetoric" and pointed out correctly that a witness—lay or expert—could not usurp the jury's function because the jury could always choose to reject the witness' testimony.³¹ Commentators also noted the serious practical liabilities of the ultimate issue rule. For example, the rule required a court to distinguish ultimate facts from mediate or non-ultimate facts;³² a task that in practice is almost impossible.³³

A more significant disadvantage of the ultimate issue rule was that it could preclude admission of the most relevant evidence in the case. Thus, in a criminal prosecution the rule could produce the absurd result of prohibiting an eyewitness from testifying that the accused was

27. See *supra* note 8.

28. It has been aptly noted that "[c]ourts and lawyers are also prone to confuse the relatively simple issue of factual causation—'Did the party's conduct contribute to plaintiff's injury?'—with the more complex policy issue of who should bear legal responsibility for what happened." L. GREEN, *supra* note 7, at 612.

29. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704[01], at 704-6 (1981); Stoebeck, *Opinions on Ultimate Facts: Status, Trends and a Note of Caution*, 41 DEN. L.J. 226, 227 (1964). The ultimate opinion doctrine seemed to have had the support of the Supreme Court at one time. See *United States v. Spaulding*, 293 U.S. 498, 506 (1935).

30. C. McCORMICK, EVIDENCE § 12, at 26 (1954); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 218 (1962); 7 J. WIGMORE, EVIDENCE § 1920 (3d ed. 1940).

31. 7 J. WIGMORE, *supra* note 30, § 1920, at 18-19.

32. 3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 704-6; Note, *Opinion Testimony and Ultimate Issues: Incompatible?*, 51 KY. L.J. 540, 542 (1963).

33. The difficulty of this distinction is not terribly surprising to students of code pleading, which required pleading of ultimate facts and not evidence. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.7 (3d ed. 1985). The desire to eliminate wasteful arguments over what is and is not an ultimate fact was one of the motivations for abandoning code pleading in favor of the notice pleading standard of the Federal Rules of Civil Procedure. The distinction between "ultimate" and "mediate" facts also caused difficulty in the discussion of collateral estoppel. *Id.* § 11.18; see also *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944).

the robber, since the identity of the accused as the culprit is the ultimate issue in the case.³⁴ Influenced by such defects, the courts began to abandon the ultimate issue rule.³⁵ By 1974, when the Federal Rules of Evidence were adopted, the abolition of the ultimate issue prohibition by Rule 704 did not produce a significant change in existing practice.³⁶

Rule 704(a) provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."³⁷ Although a proponent of expert opinion on proximate cause certainly will rely on Rule 704(a), its abolition of the ultimate issue doctrine does not mean that all opinions on ultimate issues are rendered automatically admissible. Opinion testimony—whether on an ultimate issue or not—still must meet the standards set out in Rules 702 and 403.³⁸ Thus the opinion testimony must be helpful to the trier of fact,³⁹ and the probative value of the opinion testimony must exceed the counterweights to its admission.⁴⁰

Courts construing Rule 704(a) have imposed a sensible restriction on ultimate issue testimony: the witness may not testify "in terms of inadequately explored legal criteria."⁴¹ The Advisory Committee Notes recognize the importance of this limitation and illustrate it with the following example:

The question "Did T have capacity to make a will?" would be excluded, while the

34. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 692 (1979).

35. See *Harried v. United States*, 389 F.2d 281, 285 n.3 (D.C. Cir. 1967). Chief Justice (then Judge) Warren Burger noted that courts had "long tolerated violation" of the rule. See 3 J. WEINSTEIN & M. BERGER, *supra* note 29, at 704-9.

36. 3 D. LOUISELL & C. MUELLER, *supra* note 34, at 691.

37. FED. R. EVID. 704(a). Rule 704(a) (then Rule 704) did not provoke any controversy during the rulemaking process; the version enacted by Congress is identical to the draft promulgated by the Supreme Court. See FED. R. EVID. 704(a) editorial note; 3 D. LOUISELL & C. MUELLER, *supra* note 34, at 693. In 1984 Rule 704 was amended. Codified as Rule 704(b), the amendment carved out a narrow exception to the general principle of Rule 704(a):

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704(b). The purpose of the amendment was to "eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions." S. REP. NO. 225, 98th Cong., 1st Sess. 230 (1983). The report also quotes a statement by the American Psychiatric Association to the effect that a psychiatrist who testifies to the ultimate issue of legal sanity testifies outside the area of his medical expertise. See *infra* notes 67 & 100, for additional discussion of the amendment and its purposes.

38. FED. R. EVID. 704 advisory committee's note, *reprinted in* 56 F.R.D. 183, 284 (1972).

39. FED. R. EVID. 701(b), 702; see *infra* notes 74-95 and accompanying text.

40. FED. R. EVID. 403; see *infra* notes 96-110 and accompanying text.

41. See FED. R. EVID. 704 advisory committee's note, *reprinted in* 56 F.R.D. at 284; see also *infra* notes 43-51 and cases cited therein.

question "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.⁴²

The defect in the first quoted question (remedied in the second) is that the witness, if not trained in the law, may rely on an erroneous interpretation of the governing legal standard and convey that misinterpretation to the jury in his opinion testimony.

The danger of expert opinion "in terms of inadequately explored legal criteria" is maximized when the standard is a legal "term of art which has a refined and specified legal meaning which is not readily apparent to the witness."⁴³ In such cases the misinterpretation of the standard by the witness and the transmission of the error to the jury is almost guaranteed. Several courts have adopted a common sense strategy to deal with these cases, which focuses on "whether the terms used by the witness have a separate, distinct specialized meaning in the law different from that present in the vernacular."⁴⁴ When the legal term bears the same meaning in the vernacular that it does in the specialized language of the law, there is little possibility of expert witness or jury confusion. On the other hand, if the precise legal definition of the term differs from its meaning in ordinary language, confusion is virtually assured. Thus, courts employing this test have permitted experts to opine that a person suffered "serious bodily injury,"⁴⁵ had "an intent to distribute" illegal drugs,⁴⁶ or "voluntarily" participated in a bank robbery.⁴⁷ On the other hand, courts have excluded opinions that a railroad crossing was "ultra hazardous,"⁴⁸ that a product was "unreasonably dangerous,"⁴⁹ that defendant had a "fiduciary" relationship to plaintiff,⁵⁰ or that defendant had "discriminated" against plaintiff.⁵¹

Applying this common sense test to the problem of proximate cause yields a clear conclusion. The word "proximate" in ordinary English means only "near" or "close to";⁵² the meaning of the word "cause" in ordinary English approximates the legal notion of actual cause.⁵³ Thus, if the term "proximate cause" has any meaning in ordinary Eng-

42. See FED. R. EVID. 704 advisory committee's note, *reprinted in* 56 F.R.D. at 284.

43. 3 D. LOISELL & C. MUELLER, *supra* note 34, at 696.

44. *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985).

45. *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980).

46. *United States v. Kelly*, 679 F.2d 135 (8th Cir. 1982).

47. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977).

48. *Stoler v. Penn Cent. Transp. Co.*, 583 F.2d 896 (6th Cir. 1978).

49. *Strong v. E.I. Dupont de Nemours Co., Inc.*, 667 F.2d 682 (8th Cir. 1981).

50. *Christiansen v. National Sav. & Trust Co.*, 683 F.2d 520, 529 (D.C. Cir. 1982).

51. *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985).

52. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1145 (2d college ed. 1982).

53. *Id.* at 226; PROSSER & KEETON, *supra* note 10, at 265.

lish idiom,⁵⁴ it would be "near cause" or perhaps simply "cause." The term "proximate cause" in the language of the law, however, has a far different meaning that incorporates notions of foreseeability of types of damage, classes of plaintiffs, and types of intervening events.⁵⁵ Thus, if an expert on medicine, police science, or metallurgy is asked for an opinion about the proximate cause of the plaintiff's injury, the expert is almost certain to misunderstand the question and transmit his error to the jury. The jurors, of course, know nothing of the legal intricacies of proximate causation and surely will hear the expert's conclusion as a legal opinion on cause-in-fact. Further, the notion of proximate cause is quite abstruse and counter-intuitive to the average lay juror. An instruction on the meaning of proximate cause, coming as it does in the midst of a set of oral instructions lasting thirty or forty minutes that is delivered long after the expert has offered his opinion, will be insufficient to overcome the erroneous view of both the expert and the jury that the rather strange sounding locution means anything more than "cause."

In sum, Rule 704(a)'s abolition of the ultimate issue doctrine does not guarantee admissibility of expert opinion on the ultimate issue of proximate cause. The confusion engendered by expert testimony in terms of "inadequately explored legal criteria," however, is but one reason to bar such testimony. Analysis under Rules 702 and 403 reveals others.

IV. ADMISSIBILITY UNDER RULES 702 AND 403

A. Rule 702: Testimony by Experts

Rule 702 of the Federal Rules of Evidence and its state counterparts⁵⁶ permit a witness "qualified as an expert by knowledge, skill, experience, training, or education" to testify by opinion or otherwise if the witness' special knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue."⁵⁷ The Rule thus contains two prerequisites to the admissibility of expert testimony: appropriate expertise on the part of the witness and helpfulness of the

54. Very probably the term has no meaning at all in ordinary English. There is no entry for the term "proximate cause" in either *Webster's New World Dictionary of the American Language* or the *Compact Edition of the Oxford English Dictionary*.

55. PROSSER & KEETON, *supra* note 10, at 279.

56. As of May 1987, 26 states had adopted rules of evidence that included a rule identical to Federal Rule 702; five other states had adopted versions that were substantially similar to Rule 702. See 3 J. WEINSTEIN & M. BERGER, *supra* note 29, ¶ 702[06], at 702-31 to 702-39, 415-44 (Cum. Supp. 1987).

57. FED. R. EVID. 702.

expert opinion to the trier of fact.⁵⁸ Satisfaction of these two requirements permits the expert to testify, even on the ultimate issues in the case, despite a lack of personal knowledge of the matter on trial.⁵⁹

Expert opinion on the issue of proximate cause may encompass two components: first, opinion on the actual cause, or "cause-in-fact" of the injury, since cause-in-fact is often treated as a necessary element of the larger issue of proximate cause;⁶⁰ and, second, opinion as to whether the actual cause was the "legal" or "proximate cause" of the injury. Expert testimony on cause-in-fact, by itself, presents no great difficulty under Rule 702 if the trier of fact may benefit from scientific, technical, or other specialized knowledge and the witness is qualified to provide that knowledge. In this situation the expert is merely assisting the jury in its fact finding role. Expert testimony on the actual cause of injury in tort actions is a common feature of current litigation.⁶¹ Indeed, some of the cases permitting expert testimony on "proximate cause" really concern the initial question of cause-in-fact or actual cause, and can be better understood on that ground.⁶²

Expert testimony on proximate or legal cause, however, is more problematic. There are two theories of proximate or legal cause in American law:

One of these theories is that the scope of liability should ordinarily extend to but not beyond the scope of the "foreseeable risks"—that is, the risks by reason of which the actor's conduct is held to be negligent. The second . . . theory is that the

58. As is often said, the question under Rule 702 is: can the jury receive assistance on this subject from this person? 7 J. WIGMORE, EVIDENCE § 1923, at 29 (J. Chadbourn rev. ed. 1978).

59. Expert testimony thus constitutes an exception to Rule 602's general command that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." FED. R. EVID. 602. The third sentence of Rule 602 specifically exempts expert testimony from its coverage: "[t]his rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses." Rule 703 allows an expert to express opinions based on facts of which he does not have personal knowledge. However, a witness must be found qualified to testify as an expert under Rule 702 before the personal knowledge exception of Rule 703 comes into play.

Furthermore, if a witness meets Rule 702's two-fold threshold, the door is opened to the special testimonial procedures provided by Article VII of the Federal Rules of Evidence: testimony by the witness in the form of opinion or by "a dissertation or exposition of scientific or other principles relevant to the case" (FED. R. EVID. 702 advisory committee's note); the witness' statement of opinions or inferences and reasons therefore on direct examination "without prior disclosure of the underlying facts or data unless the court requires otherwise" (FED. R. EVID. 705); and the admissibility of opinion based on facts or data not personally known to the witness or otherwise admissible in evidence if of the kind reasonably relied upon by experts in her field (FED. R. EVID. 703). See Sutton, *Article VII: Opinions and Expert Testimony*, 20 HOUS. L. REV. 445, 451-52 (1983).

60. PROSSER & KEETON, *supra* note 10, at 264.

61. 7 J. WIGMORE, *supra* note 58, § 1976, at 168-89; PROSSER & KEETON, *supra* note 10, at 270.

62. See, e.g., *Bosse v. Ideco Div. of Dresser Indus., Inc.*, 412 F.2d 567, 570 (10th Cir. 1969); *Thompson v. White*, 274 Ala. 413, 419-20, 149 So. 2d 797, 803-05 (1963); *Brooks v. Piwinski*, No. 47965 (Ohio Ct. App. Nov. 8, 1984).

scope of liability should ordinarily extend to but not beyond all "direct" (or "directly traceable") consequences and those indirect consequences that are foreseeable.⁶³

Whichever theory a jurisdiction applies will be embodied in its jury instructions. Under the first theory of proximate cause, the judge will direct the jury to determine, for example, whether the injury was "the natural and probable consequence of the negligent act, and that [the injury] ought to have been foreseen—not necessarily the precise actual injury, but some like injury likely to result therefrom."⁶⁴ An instruction expressing the second theory describes proximate cause as "that cause which in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred."⁶⁵

The jury's task is thus to determine the historical facts and assess them under the applicable definition of proximate cause contained in the court's instructions. This involves a classic instance of law application, or what is sometimes called a mixed question of law and fact or a determination of the existence of ultimate fact.⁶⁶ A witness who gives her opinion that the acts or omissions of the defendant constitute the proximate cause of the plaintiff's injuries implicitly states in conclusory form that the plaintiff's injuries were within the scope of the "foreseeable risks" or were "directly traceable" to the defendant's conduct. The questions under Rule 702 are: first, whether the witness possesses the requisite expertise to render an opinion on the issue of proximate cause; and, second, whether such an opinion would be helpful to the jury in understanding the evidence or determining a fact in issue.

1. Expertise

The issue of proximate cause is different from that of the actual cause of the injury. Whether the witness is qualified by knowledge,

63. PROSSER & KEETON, *supra* note 10, at 273; see also Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 413-15 (1984).

64. Idaho jury instruction approved in 1951, cited in 4 E. BRANSON, *THE LAW OF INSTRUCTIONS TO JURIES* 389 (A. Reid repl. 3d ed. 1962).

65. *Cable v. Johnson*, 63 S.W.2d 433, 438 (Mo. Ct. App. 1933) (quoting *George v. Kansas City S. Ry. Co.*, 286 S.W. 130, 131 (Mo. Ct. App. 1926)).

66. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 369-81 (tent. ed. 1958); see also J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 62-83 (1898); Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 996 & n.19, 1002-03 (1986); Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232-37 (1985); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 93-124 (1944); Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1871-76 (1966).

skill, experience, training, or education to render an opinion on the existence *vel non* of proximate cause is therefore separate and distinct from the question of the witness' technical expertise on actual cause. Professor Maguire illustrated the distinction between technical expertise and the expertise needed to apply the technical conclusion in a legal context with the following example:

For instance, lawyers are now and then stumped by a successful objection to the request: "Now, doctor, state whether in your opinion the deceased was competent to make a will." They should remember that while the medico may be fully competent to appraise mental condition, he does not necessarily have accurate knowledge of the legal formula for testamentary capacity.⁶⁷

Buried within counsel's conclusory question to the witness is a hidden inquiry into the content of the appropriate legal standard, a subject that is beyond the witness' technical expertise.

Case law under Rule 702 supports the refusal to permit expert testimony that is beyond the witness' field of expertise.⁶⁸ Ordinarily, an expert testifying on actual cause by reason of scientific, medical, or technical expertise will have no special knowledge, skill, experience, or training on either the meaning of the term "proximate cause" or its application to the facts of the case. This lack of expertise alone should bar experts on actual cause from giving their opinions on proximate cause.⁶⁹

Who, then, would have the requisite background to give expert testimony on proximate cause? In the rare instances in which expert testimony on the application of law to fact has been admitted as helpful to the trier of fact,⁷⁰ courts have found law professors,⁷¹ experienced prac-

67. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 31 (1947). Compare the 1984 amendment to Rule 704 that bars experts testifying on the defendant's mental state or condition from giving an opinion as to whether or not the defendant had the mental state constituting an element of the crime or defense. FED. R. EVID. 704(b). The Senate Judiciary Committee's Report, S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983) (quoting the American Psychiatric Association Statement on the Insanity Defense 18-19 (Dec. 1982)), states: "[I]t is clear that psychiatrists are experts in medicine, not law."

68. See, e.g., *United States v. Marabelles*, 724 F.2d 1374, 1381-82 (9th Cir. 1984); *Rimer v. Rockwell Int'l Corp.*, 641 F.2d 450, 456 (6th Cir. 1981).

69. *But see* *Brooks v. Piwinski*, No. 47965 (Ohio Ct. App. Nov. 8, 1984) (physician permitted to testify in terms of proximate cause); *Fidelity & Guar. Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc.*, 48 Ohio App. 2d 319, 322-23, 357 N.E.2d 388, 391 (1974) (arson investigator should be permitted to testify in terms of both actual and proximate cause). The lack of expertise on proximate cause should not bar a technical expert from testifying when the expert testifies in terms of foreseeability of the risk, rather than in terms of proximate cause itself. See *infra* note 110 and accompanying text.

70. See *infra* note 81.

71. See *Crom Corp. v. Crom*, 677 F.2d 48, 50 (9th Cir. 1982) (practitioner and lecturer in patent law qualified to testify as expert); *United States v. Garber*, 607 F.2d 92, 94-95 (5th Cir. 1979) (en banc) (government proffered expert who taught and practiced tax law on the issue of taxability of money received from sale of blood antibodies); *Sharp v. Coopers & Lybrand*, 457 F.

titioners,⁷² and judges⁷³ to be qualified as experts. If such testimony on the issue of proximate cause is otherwise admissible under the Federal Rules of Evidence, it should come only from witnesses with the knowledge, experience, or education that long practice or academic inquiry provide. Prosser or Keeton would be the ideal expert witnesses on proximate cause. Whether even the most qualified expert witness on proximate cause should be permitted to testify on this issue, however, requires an examination of the helpfulness of the testimony to the trier of fact.

2. Helpfulness to the Trier of Fact

To determine the issue of proximate cause, the jury, as the trier of fact, must first find the historical facts and then assess them in terms of the legal standard contained in the court's instructions. This assessment involves two phases: first, further refinement of the legal standard (norm elaboration); and, second, application of that elaborated norm to the historical facts. Under Rule 702, expert assistance with either of these functions must "assist the trier of fact to . . . determine a fact in issue" in order to be admissible. Helpfulness to the jury as trier of fact requires an examination of the value of expert opinion on both of these functions, as well as consideration of any countervailing drawbacks.

Norm elaboration involves the jury's attempt to refine the legal standard contained in the court's instructions. As Professor Henry P. Monaghan has pointed out:

If all legal propositions could be formulated in great detail, [law application] . . . would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment. Thus, law application frequently entails some attempt to elaborate the governing norm.⁷⁴

A jury applying the court's instructions on proximate cause would engage in "norm elaboration" by further refining the terms "foreseeability" or "direct consequences." This process may occur explicitly during deliberations or implicitly in the jury's discussion and resolution of the

Supp. 879, 883 (E.D. Pa. 1978), *aff'd in part*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (law professor expert on federal income taxation qualified to testify to material misrepresentations and omissions in accounting firm opinion letter).

72. See *Garber*, 607 F.2d at 95-97 (defendant proffered certified public accountant and former revenue agent on issue of taxability of money received from sale of blood antibodies). *But see DiBella v. Suffolk County*, 574 F. Supp. 151, 152-54 (E.D.N.Y. 1983), *aff'd*, 762 F.2d 1990 (2d Cir. 1985) (testimony of experienced prosecutor proffered as expert on existence of probable cause for arrest held inadmissible).

73. *In re Estate of Seelig*, 2 Ohio App. 3d 223, 224-25, 441 N.E.2d 598, 600-01 (1981).

74. Monaghan, *supra* note 66, at 236 (footnote omitted).

case.

Expert opinion on the issue of proximate cause is unlikely to assist the jury in its norm elaboration function. First, an expert rarely makes explicit the norm elaboration underlying his or her opinion. The expert's testimony is often delivered in conclusory form, simply stating that "X was proximately caused by Y." Such conclusory testimony hides the expert's own implicit process of norm elaboration. Theoretically, at least, this difficulty can be surmounted by the opponent's exploration on cross-examination of the expert's underlying premises.⁷⁵

A more serious objection is that, for policy reasons, legal standards are often left at a general level and not further elaborated in jury instructions or by appellate courts. The reasonable man standard in negligence is an oft-cited example.⁷⁶ The question of what a reasonable person would have done under the circumstances is generally for the jury, because of "the public's desire to have its conduct judged by the layman ('the man on the street') rather than by the more sophisticated and expert judgment of the trained lawyer, whose judicial experience may have given him a biased point of view."⁷⁷ The same arguments counsel against presenting the jury with an expert's more detailed definition of proximate cause,⁷⁸ which, it has been pointed out, is ultimately only a formula to limit the scope of liability based on notions of justice and administrative efficiency.⁷⁹ Proximate cause is defined in relatively general terms precisely because we want the jury to apply its own experience and values to any further norm elaboration, a process that is purposely kept invisible and case specific.⁸⁰ Expert testimony explicitly suggesting a more precise standard by which to evaluate the issue of proximate cause undermines this goal.

Furthermore, if the jury is to be given a more specific definition of proximate cause, that instruction should come from the judge, not an

75. FED. R. EVID. 705 permits expert opinion without prior disclosure of the underlying facts or data, although such facts or data must be disclosed on cross-examination. It may be that elucidation of the basis for the expert's opinion will do the cross-examiner more harm than good by either bolstering the expert's testimony or confusing the jury with definitional disputes. In other words, Rule 705 may not protect adequately against conclusory opinions on law application.

76. See PROSSER & KEETON, *supra* note 10, at 237.

77. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116 (1924); see also PROSSER & KEETON, *supra* note 10, at 237; James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 668, 685-87 (1949) (jury is supposed to bring "the common sense wisdom of the layman to bear on the problems of finding facts" and evaluating conduct).

78. 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 20.6, at 172-73 (2d ed. 1986) (indicating that although "it may be undesirable to entrust the jury with almost complete discretion in imposing liability, a single rule or formula that attempts to reduce all the cases to a simple pattern may not be any more desirable").

79. PROSSER & KEETON, *supra* note 10, at 264.

80. Monaghan, *supra* note 66, at 236; see also *infra* notes 93-95 and accompanying text.

expert witness, for the same reasons that experts are generally barred from expounding the law to the jury.⁸¹ Such testimony is prohibited because the special legal knowledge of the judge makes the witness' testimony superfluous,⁸² and because "the jury may think that the 'expert' in the particular branch of the law knows more than the judge."⁸³ In addition, expert testimony on the law extends the battle of experts before the jury to yet another front. It also raises the possibility of considerable objection and argument before the trial judge on the legal correctness of the expert's opinions. For all of these reasons, expert testimony elaborating on the meaning of proximate cause should be rejected under Rule 702 as unhelpful to the jury.

Evaluation of the usefulness of expert testimony in the second aspect of the jury's assessment of the evidence—application of the elaborated norm on proximate cause to the historical facts—involves a number of different but related considerations. As discussed above, the only witness even arguably qualified to render an opinion on the existence of proximate cause is one familiar with the case law on that subject.⁸⁴ The expert's opinion amounts, in effect, to a statement that the applicable precedents, as she interprets them, dictate a particular result under an assumed set of facts. The expert thus is injecting her view of precedent into the jury's application of the law to the facts.

Expert opinion of this type ties the jury's law application process more to precedent than otherwise would be the case. At one extreme of "precedentiality" is the jury's application of the law uninformed by either judicial or expert views of how this case fits with prior applications of the law. At the other extreme is the application of precedent, in the

81. *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984); *Stoler v. Penn Cent. Transp. Co.*, 583 F.2d 896, 899 (6th Cir. 1978); *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-10 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); E. CLEARY, *McCORMICK ON EVIDENCE* § 12, at 31 (3d ed. 1984); 7 J. WIGMORE, *supra* note 58, § 1952, at 103. In *United States v. Garber*, 607 F.2d 92, 94-97 (5th Cir. 1979) (en banc), expert testimony on the taxability under the Internal Revenue Code of the sale of blood antibodies was held admissible as relevant to the issue of willfulness by showing that the defendant was not aware of the tax liability or simply made an error in judgment. See Note, *United States v. Garber: The Propriety of Expert Legal Testimony*, 26 ST. LOUIS U.L.J. 447 (1982). Expert testimony on the state of the law also may be appropriate when the objective legal reasonableness of action taken under color of law is at issue. See *Malley v. Briggs*, 475 U.S. 335, 343-44 (1986); *United States v. Leon*, 468 U.S. 897, 918-21 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Laverne v. Corning*, 376 F. Supp. 836, 838-40 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 1144 (2d Cir. 1975). Two recent law review articles advocate expanded admissibility of expert testimony on the law, though mainly as an aid to the court in its law declaration function rather than to the jury in its law application role. Friedland, *Expert Testimony on the Law: Excludable or Justifiable?*, 37 U. MIAMI L. REV. 451 (1983); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984).

82. 7 J. WIGMORE, *supra* note 58, § 1952, at 103.

83. *Marx & Co.*, 550 F.2d at 512.

84. See *supra* notes 67-73 and accompanying text.

form of reported decisions, which apply the legal standard to cases similar to the case at bar. Law application at this extreme becomes a question of law for the court. In *The Common Law* Oliver Wendell Holmes argued for this position. Believing that "the tendency of the law must always be to narrow the field of uncertainty,"⁸⁵ Holmes suggested that the lessons of prior jury law application be distilled into legal rules to be applied by the court on motions for directed verdict:

[S]upposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any other such question should not be settled. . . .⁸⁶

By and large, Holmes' position has been rejected,⁸⁷ and questions of law application have been treated in an ad hoc, non-precedential manner.⁸⁸ The reasons for this approach reveal the limited usefulness of expert testimony to a jury in its law application function.⁸⁹ First, precedent on law application is not readily accessible. Jury decisions are not reported, and in any event, law application is often buried in a general verdict.⁹⁰ Since the scope of appellate review of such mixed questions of law and fact is limited,⁹¹ reported decisions are likely to be fewer and narrower than the actual number and range of occasions of law application.

Second, it is not clear in any event how much light precedent sheds on questions of law application. Holmes himself recognized this problem in *The Common Law*:

The trouble with many cases of negligence is that they are of a kind not frequently recurring so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.⁹²

The same can easily be said about proximate cause; whether a consequence was "foreseeable" or not in one case does not help a jury to

85. O. HOLMES, *THE COMMON LAW* 127 (1881).

86. *Id.* at 123; see also Weiner, *supra* note 66, at 1893-94.

87. Louis, *supra* note 66, at 1021-23.

88. *Id.* at 1003-07.

89. Judicial application of law to fact may violate the seventh amendment's guarantee of the right to trial by jury. See Weiner, *supra* note 66, at 1889-93. Because expert testimony on law application does not deprive the jury of that role in the same way as judicial intervention, a comparable seventh amendment problem is not raised by expert testimony.

90. Monaghan, *supra* note 66, at 236.

91. Louis, *supra* note 66, at 998-99, 1003-07 *passim*.

92. O. HOLMES, *supra* note 85, at 129.

decide whether a different event was foreseeable to a different actor in a different situation. In those rare cases in which there is clear determinative precedent on the issue, its proper use is in a directed verdict, not as evidence for the trier of fact.

Third, and probably most importantly, in order for society to get the full benefit of the experience and wisdom of the lay triers of fact, the jurors must be free to apply the legal standard to the facts afresh. As the Supreme Court has stated:

[I]t is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. . . . It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.⁹³

The problem with expert opinion on law application is not that the expert's testimony "usurp[s] the function of the jury," since, as commentators have pointed out, the jury is free to reject the expert's advice.⁹⁴ Rather, the concern is that the expert's opinion deflects the jury from its accepted role of assessing the evidence and applying the law in light of its collective perceptions, experiences, and community sense of fairness.

That role requires the jury's application of law to be completely non-precedential, "like a ticket good for a specific trip only."⁹⁵ Although expert testimony on the application of a legal standard does not remove that function from the jury altogether, as would making the issue a question of law for the court, it does invite the jury to consider precedent in its decision. One of the reasons our judicial system values the jury so highly is because a jury does not consider how others have decided similar cases.

B. Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Expert testimony on the issue of proximate cause, as with other mixed questions of law and fact, presents real dangers of misleading the

93. *Sioux City & Pacific R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 663-64 (1873).

94. 7 J. WIGMORE, *supra* note 58, § 1920, at 18-21; Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 424 (1952).

95. Monaghan, *supra* note 66, at 236.

jury, confusing issues, and wasting time. Rule 403⁹⁶ permits the court to exclude the testimony when these considerations substantially outweigh whatever help such testimony might provide.⁹⁷ As discussed above, the difference between the legal definition of proximate cause and its ordinary meaning increases the probability that expert opinion on the subject will mislead the jury.⁹⁸ Even when the possibility of such misunderstanding is minimized, expert testimony on proximate cause has a tendency to confuse the issues by directing the jury's attention to the evaluation of the expert's credentials, reasoning, and conclusions. If, as Judge Jack Weinstein contends, "[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous,"⁹⁹ litigants should have no problem finding experts willing to opine on both sides of virtually any law application issue, especially one as open to debate as proximate cause.¹⁰⁰ Paid advocates for each side thus would appear in the guise of expert witnesses. Parties then would be forced to contend over the qualifications of their respective experts, the experts' views of precedent, and the application of precedent to the facts of the case.¹⁰¹ The overriding danger is that, by virtue of the presence of the contending experts in the case, the jury will view its task as deciding the relative impressiveness and wisdom of the experts instead of the issue of law application itself. Further weighing in the balance is the time, and party expense, such testimony would consume.¹⁰²

96. FED. R. EVID. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

97. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702.4 (2d ed. 1986); D. LOISELL & C. MUELLER, *supra* note 34, § 382, at 643; J. WEINSTEIN & M. BERGER, *supra* note 29, ¶ 702[01]; Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 ILL. L. REV. 43, 47 (1986); Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 326, 331 (1982).

98. See *supra* notes 41-55 and accompanying text.

99. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986).

100. Dissatisfaction with psychiatric testimony in criminal cases phrased in terms of the legal standard, primarily on the issue of the accused's sanity, led Congress to enact Rule 704(b) in 1984. See *supra* note 37. According to the Senate Report, "[t]he purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. . . . 'Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.'" S. REP. NO. 225, 98th Cong., 1st Sess. 230-31 (1983).

101. See *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 511, *cert. denied*, 434 U.S. 861 (1977) (indicating that "we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law").

102. See Pratt, *supra* note 97, at 315 (suggesting that "if a witness' opinion, even when based on her perception, does no more than draw an inference from facts readily expressed from the witness stand, it is not truly 'helpful' and, therefore, may be excluded as a 'waste of time'").

Since the enactment of the Federal Rules of Evidence, federal courts generally have barred expert opinion on law application based on the authority of Rules 702 and 403. Thus, courts have precluded expert testimony that a manufacturer's notice did not provide adequate warnings of a product's dangers,¹⁰³ that a party's conduct did or did not constitute discrimination,¹⁰⁴ that previous product sales amounted to prior public use and prior art under patent law,¹⁰⁵ that the facts underlying an arrest established probable cause.¹⁰⁶ In the case most similar to the issue of admissibility of expert testimony on proximate cause, the United States Court of Appeals for the Fifth Circuit upheld the exclusion of an expert's opinion on the legal "cause" of an accident. In that case there was no dispute as to the factual cause, and the court held that the testimony constituted a legal conclusion that merely told the jury what result to reach.¹⁰⁷ Opinions phrased in terms of legal criteria generally are admitted as helpful only when necessary to convey the witness' total impression of underlying factual matter.¹⁰⁸ In other words, when expert testimony on factual questions stated in terms identical to the legal standard comes into evidence, it does so despite that concordance rather than because of it.

In sum, expert testimony on the issue of proximate cause at best can do nothing more than provide the expert's view of how the instant case fits with prevailing precedent. The infusion of precedent on law

103. *Strong v. E.I. Dupont de Nemours Co., Inc.*, 667 F.2d 682, 686 (8th Cir. 1981).

104. *Torres v. County of Oakland*, 758 F.2d 147, 149-51 (6th Cir. 1985); *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1270-71 (9th Cir. 1980).

105. *E.I. Dupont de Nemours & Co. v. Berkley & Co., Inc.*, 620 F.2d 1247, 1272-74 (8th Cir. 1980).

106. *DiBella v. Suffolk County*, 574 F. Supp. 151, 152-54 (E.D.N.Y. 1983), *aff'd*, 762 F.2d 1990 (2d Cir. 1985); *McArthur v. Robinson*, 98 F.R.D. 672, 678 (E.D. Ark. 1983).

107. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239-40 (5th Cir. 1983). In *Owen* the plaintiff, a bulldozer operator, claimed that the defendant negligently placed and failed to mark an underground pipeline. The defendant contended that the plaintiff was contributorily negligent in digging in the area without ascertaining the exact location of the pipeline. At issue in the case was the following question asked by defendant's counsel of its expert witness:

Now, Mr. Stone, you have been qualified as an expert in petroleum engineering and operation, installation and maintenance of gas gathering systems. Now, after hearing all of the evidence, looking at all of the exhibits, hearing in particular all of the witnesses, primarily plaintiff's witnesses, do you have any opinion as to the cause of the accident of July 8th, 1978?

Id. at 239.

108. One commentator suggests that an opinion of an expert is helpful only in the following circumstances:

(1) when an expression of the witness' knowledge can be conveyed in no other form, (2) where an accurate, total impression was formed by a witness who is unable to account for all the details upon which it was based, or (3) most importantly where an accounting of the details by itself alone cannot accurately convey the total impression held by the witness.

M. GRAHAM, *supra* note 97, § 704.1, at 647.

application may not be possible and in any event, is of little or no use to the jury. The only effect, then, of the testimony is "to tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day."¹⁰⁹ At the very least, the expert will be regarded as a "thirteenth juror," contributing, if only from the witness stand, to the jurors' application of the legal standard. Expert advice on how to decide the case is of no legitimate help to the jury, and merely serves to confuse the issues, mislead the trier of fact and waste the time and resources of the parties and the tribunal. Expert opinion phrased in terms of the existence of "proximate cause" thus seems to fail the tests of admissibility under both Rule 702 and Rule 403.¹¹⁰

V. CONCLUSION

The conclusion of this Article is twofold. On one level, it is quite clear that an expert witness should not be permitted to give an opinion on the issue of proximate cause. Although Rule 704(a) permits testimony on an ultimate issue, the Rule does not sanction an opinion phrased in terms of an inadequately explored legal standard. Further,

109. FED. R. EVID. 704 advisory committee's note, *reprinted in* 56 F.R.D. 183, 285 (1972). Oath helpers were an important part of the Anglo-Saxon form of trial by oath, known as compurgation. A party would swear his own oath to the truth of his claim and the oath helpers would swear to the truthfulness of the party's oath, or, as it was later refined, to their belief in its truth. These oath helpers did not need to have personal knowledge of the facts and were originally often kinsmen of a party. As the rule developed, the accused in a criminal case was not permitted to choose the oath helpers, nor could his relatives serve in that capacity. The oath helpers were chosen and struck in the manner of a modern petit jury. In this later form, oath helpers thus held a more impartial relationship to the parties than do present-day expert witnesses. For a concise description and history of compurgation, see J. THAYER, *supra* note 66, at 24-30.

110. By contrast, expert testimony on the factual questions underlying the issue of proximate cause may be quite appropriate. A defendant in a tort action is liable for the risk she should have perceived in light of both her own knowledge and experience as well as what a reasonable person in her position would have perceived. James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 4-5, 12-14 (1951). Expert testimony on whether a particular risk was foreseeable to the actor may elucidate whether a person with particular skill and experience should have foreseen a particular risk, or whether or not a consequence could, in light of the practice in a particular field, be regarded as direct and foreseeable. However, in *Garza v. Indiana & Michigan Electric Co.*, 338 F.2d 623 (6th Cir. 1964), which was decided prior to the enactment of the Federal Rules of Evidence, the court barred expert opinion on the question of whether an electric power company should have foreseen that an irrigation pipe might be raised vertically and come into contact with its power line because the opinion related to an "ultimate fact." Expert testimony on these essentially factual issues may assist the jury without raising the dangers of opinion phrased in terms of "proximate cause" itself. This distinction is analogous to the one courts have often made between testimony on "safe" or "reasonable" practices, which is usually admitted, and conclusions about "negligence," which are usually excluded. See, e.g., *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); M. GRAHAM, *supra* note 97, § 704.1, at 648 and cases cited therein. Expert testimony on the issue of proximate cause, then, should, if otherwise proper, be addressed to the factual elements such as foreseeability that bear on the jury's application of the legal standard.

an opinion on the issue of proximate cause fails to meet either of the requirements of Rule 702. The typical expert witness called to testify in a tort action will have no expertise on proximate cause. For this reason alone, the testimony of such a witness should be barred. Even supposing the witness' legal expertise, the opinion will not be helpful to the jury because it contributes nothing but a judgment on how the legal standard should be interpreted and applied. As to the former, such norm elaboration is generally treated either as a jury function or as a task for the court. As to the latter, application of the legal standard to the facts is the fundamental benefit society seeks to obtain from the use of lay triers of fact. Thus, expert testimony provides no assistance and amounts to little more than advice to the jury on what decision it should reach.

On another level, expert testimony on proximate cause raises a concern about all testimony on an ultimate issue by a legal expert. When a legal expert testifies on a question of law application, the expert's opinion incorporates her experience with other cases similar to the case at bar. The result is that the jury is invited to consider precedent—implicitly or explicitly summarized in the expert's conclusion. On issues of law application, such as proximate cause or the reasonable man standard, however, our judicial system values the jury precisely because it does not consider precedent. Permitting a legal expert to testify as to how others have decided similar cases subtly undermines that significant value.