

Date of Hearing: June 6, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
SB 652 (Umberg) – As Amended April 13, 2023

PROPOSED CONSENT (As Proposed to be Amended)

SENATE VOTE: 36-0

SUBJECT: EVIDENCE: EXPERT TESTIMONY

KEY ISSUE: SHOULD EXISTING LAW REGARDING EXPERT TESTIMONY OFFERED TO PROVE CAUSATION IN PERSONAL INJURY OR WRONGFUL DEATH ACTIONS BE CLARIFIED SO THAT WHEN TESTIFYING TO A JURY ABOUT THE CAUSE OF AN INJURY, ALL EXPERTS MUST PROVIDE THEIR OPINION REGARDING THE CAUSE OF THE INJURY TO A REASONABLE DEGREE OF PROBABILITY?

SYNOPSIS

A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. Under Evidence Code Section 720, subdivision (a), a person is qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Section 720 (a).)

*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. A recent appellate court decision in *Kline v. Zimmer, Inc.* (2022) 79 Cal. App. 5th 123 upended this well-established principle by holding that the reasonable medical probability requirement only applies to the party bearing the burden of proof on the underlying issue. The author and sponsor 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, in response to *Kline*, makes clear that all expert witness opinion testimony offered to prove causation in a personal injury action must be based upon a reasonable degree of probability. Arguably, the bill in print is too broad because it applies a standard which is supposed to be applicable to expert testimony in the specific context of medical causation to expert opinion offered in any civil case. While the "reasonable degree of probability" standard of admissibility has typically applied only when the expert is testifying on the issue of medical causation in a civil action for personal injury or wrongful death, there are numerous issues across civil case types that incorporate expert opinion. In order to address the unintended consequences of the language of the bill in print, the author proposes to delete the bill's proposed amendments to Evidence Code Section 801 and instead enact a new section of the Evidence Code. The amendments are incorporated into the SUMMARY, below, and explained in the analysis. The bill is sponsored by the Consumer Attorneys of California and supported by the Brain Injury Association of California. It has no opposition on file.*

SUMMARY: Clarifies and codifies longstanding law regarding the standard for expert witness testimony by ensuring that when testifying to a jury about the cause of an injury, all experts provide their opinion regarding the cause of the injury to a reasonable degree of probability. Specifically, **this bill:**

- 1) Provides that where the party bearing the burden of proof proffers expert testimony regarding medical causation and where that party's expert is required as a condition of testifying to opine that causation exists to a reasonable medical probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability except as provided in 2).
- 2) Clarifies that 1) does not 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.

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. (Evidence Code Section 720 (a). All further statutory references are to this code, unless otherwise indicated.)
- 2) Permits a witness' special knowledge, skill, experience, training, or education to be shown by any otherwise admissible evidence, including the witness' own testimony. (Section 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 the following:
 - a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.
 - 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. (Section 801.)
- 4) Provides that a witness testifying in the form of an opinion may state on direct examination the reasons for their 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. (Section 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. (Section 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. (Section 721.)

FISCAL EFFECT: As currently in print the bill is keyed non-fiscal.

COMMENTS: This bill seeks to clarify and codify longstanding law regarding the standard for expert witness testimony in a civil case for personal injury or wrongful death where causation of the injury or death is at issue by ensuring that when testifying to a jury about the cause of the injury, all experts provide their opinion regarding the cause of the injury to a reasonable degree of probability. At the same time, the bill would allow an expert witness, when testifying for the party who does not have the burden of proving medical causation, to testify that a matter cannot meet a reasonable degree of probability in the applicable field, and to provide the basis for their opinion. According to the author, this bill clarifies and restores longstanding principles in the law regarding expert testimony in a civil case for personal injury or wrongful death where causation of the injury or death is at issue. The author states:

. . . 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.

Expert Testimony. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. Under Evidence Code Section 720, subdivision (a), a person is qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Section 720 (a).)

However, even when the witness qualifies as an expert, he or she does not possess a *carte blanche* to express any opinion within the area of expertise. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633.) An expert's opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence. (*Ibid.*) Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests. (*Ibid.*)

"[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. . . . But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772.)

Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion "the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and

the expert testimony is not contradicted.” (*Howard v. Owens Corning* (1999) 72 Cal. App. 4th 621, 633 [citations omitted].)

***Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123.** 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. (*Jones v. Ortho Pharm. Corp.* (1985) 163 Cal. App. 3d 396, 402.) 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. The appellant argued that 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--was improper. The appellate court agreed with the appellant, finding that the same standard did 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. (*Kline, supra*, 79 Cal. App. 5th at pp. 131-32.)

The appellate court held that the defendant did not need to show that a different cause was established to a reasonable probability as 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. (*Ibid.*) The appellate 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.” (*Ibid.*) The author and sponsor of the bill argue that the *Kline* decision was incorrectly decided and could negatively impact litigants. 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.

Author’s amendments. The bill in print would create an additional requirement that, *in any civil case*, for an expert to testify in the form of an opinion, that expert’s opinion must be based on a standard of a reasonable degree of probability in the expert witness’ field of expertise. The bill in print also allows an expert to testify that a matter cannot reach a reasonable degree of probability in the field and to provide the basis for that opinion.

Arguably, the bill in print is too broad because it applies a standard which is supposed to be applicable to expert testimony in the specific context of *medical causation* to expert opinion offered in *any civil case*. While the “reasonable degree of probability” standard of admissibility

has typically applied only when the expert is testifying on the issue of medical causation in a civil action for personal injury or wrongful death, there are numerous issues across civil case types that incorporate expert opinion. To apply the standard applicable to medical causation to any expert opinion offered in any civil case would expand the scope of the standard beyond its intended purpose. This could disadvantage petitioners as well as respondents, and could cause significant confusion and uncertainty for litigating parties and the courts.

In order to address the unintended consequences of the language of the bill in print, the author proposes to delete the bill's proposed amendments to Evidence Code Section 801 and instead enact a new section of the Evidence Code, Section 801.1, to read as follows:

801.1. (a) Where the party bearing the burden of proof proffers expert testimony regarding medical causation and where that party's expert is required as a condition of testifying to opine that causation exists to a reasonable medical probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability except as provided in subdivision (b).

(b) Subdivision (a) does not 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.

ARGUMENTS IN SUPPORT: The Consumer Attorneys of California, sponsor of the bill, write the following about why the bill is important and necessary:

This one-sided lowering of the standard [endorsed by the *Kline* decision] allows defense experts to offer any alternative cause whether they have data, science, or any rationale to support that cause. Anything may arguably be possible. As long as the action is a "possible" cause for the injury, and not purely speculative, *Kline* now permits this weaker, unreliable testimony to be provided to juries by an expert with credibility that is now illusory. This case has opened up the floodgates for junk science and simply absurd expert testimony.

...

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.

REGISTERED SUPPORT / OPPOSITION:

Support

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

Opposition

None on file

Analysis Prepared by: Alison Merrilees / JUD. / (916) 319-2334