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Experts

by Carl E. Schneider

George Bernard Shaw famously said that all professions are conspiracies against the laity. Less famously, less elegantly, but at least as accurately, Andrew Abbott argued that professions are conspiracies against each other. Professions compete for authority to do work and for authority over work. The umpire in these skirmishes and sieges is the government, for the state holds the gift of monopoly and the power to regulate it.

In Abbott's terms, "bioethics" is contesting medicine's power to influence the way doctors treat patients. If it follows the classic pattern, bioethics will solicit work and authority by recruiting government's power. A homely but exemplary recent case suggests one form that the struggle can take and some terms it may employ.

The case is *Hall v. Anwar*.¹ Its story is sad. When Larry Joseph Hall was born prematurely, he weighed only 822 grams. He was "blue, flaccid, and limp." Dr. Anwar tried to resuscitate him. Nurses recorded "a decreasing heart rate." Dr. Anwar, however, said at the subsequent trial that he never heard a heartbeat, and he gave the boy an APGAR score of zero, which meant he believed there was no heartbeat. After trying to revive the infant for eleven minutes, Dr. Anwar concluded that he was dead. The child was "wrapped in a blanket and placed in a warmer." Fifteen minutes later, however, "a technician noticed that the infant was grimacing and attempting to cry." Dr. Anwar was summoned and "resumed efforts to resuscitate the child." The child lived

but did not prosper. He "suffers various conditions including severe brain damage."

The Halls sued Dr. Anwar and the hospital for malpractice. They claimed that Dr. Anwar and the nurses performed negligently when they first tried to revive Larry and that they should have persisted for more than eleven minutes.

As in many malpractice cases, the trial in *Hall* considered whether the alleged malpractice had actually caused the patient's disabilities (whether, that is, anything Dr. Anwar and the hospital did worsened Larry's medical problems or whether, instead, "internal conditions during the pregnancy caused all of the infant's injuries"). But the case's interest for us arises out of the Halls' argument that Dr. Anwar performed below the "medical standard of care." Various doctors testified that he did not. Dr. Anwar's lawyer also presented a videotape of

deposition testimony of Father John Paris, a Catholic priest and professor of bioethics. . . . This deposition had been taken during discovery by the Halls' attorney without any cross-examination by the defendants. Father Paris is an expert in the area of medical ethics. He has spent significant time in hospitals and engaged in professional activities in conjunction with medical professionals.

The priest-ethicist "attempted to provide an expert opinion that Dr. Anwar's actions concerning all aspects of the re-

suscitation were 'appropriate' and 'within the standard of care.'"

The jury found that Dr. Anwar was not liable, and the Halls appealed. The Halls contended that the trial judge should not have let the jury see the ethicist's deposition. The appellate court agreed.

The appellate opinion is in many ways quite a typical product of a common law court. The opinion confronts a question courts have not fully explored: to what extent can bioethicists testify as experts in medical malpractice trials? But the opinion refuses to evaluate that question as an abstract issue or even to decide it as a matter of principle. Rather, the court asks whether the specific testimony of the specific witness in the specific case should have been admitted. The theory of common law adjudication ratifies this reticence. That theory expects that—if the issue is important—it will recur in other cases in various forms. Each new instantiation will present somewhat different facts, and each court will ask whether the specific evidence should be admitted in light of the gathering precedent and the new circumstances. After this process of garnering examples and testing principles has proceeded for a while, courts can begin to draw broad rules from the developing pattern of holdings about the admissibility of ethicists' testimony. The process is incremental, cautious, concrete, pragmatic, and (however feebly) empirical. It can also be opaque, unreflective, and erratic, particularly in its early stages.

The *Hall* court began with black-letter law. Malpractice is a failure to meet a profession's minimum standards. Professions handle abstruse and technical problems laymen do not understand. They thus must set their own standards. As one typical formulation puts it, doctors must "exercise that degree of care, skill, and learning expected of a reasonably prudent" doctor in the same specialty. The jury must be told what medicine's standards are, but only by people who understand them—by professionals, and even professionals in the same specialty. The *Hall* court cited a case that held that "a pulmonary specialist

[is] not qualified to opine on [the] standard of care of [an] emergency room physician.”

The court then applied the general rule to the specific case: “Father Paris was not qualified to render opinions about a medical standard of care.” The court did not suggest that the priest was not some kind of expert. But he was the wrong kind: “If Father Paris had testified solely as to whether it was moral or ethical to resuscitate or terminate resuscitation of the infant, then his testimony would have been irrelevant to the legal issue of malpractice.” The “legal issue of malpractice” is whether professional standards are violated, and who knows better than members of the profession?

The court saw one of the problems with this argument: “We recognize that some medical standards of care are influenced by medical ethics. A decision concerning the termination of resuscitation efforts is probably an example of an area in which the standard of care includes an ethical component.” The court saw the problem, but its answer was perhaps rather conclusory: “The standard of care . . . still involves the level of care owed by a similar health care provider and not that owed by an ethicist.” Again, malpractice is a breach of professional standards; professionals know those standards best.

Implicitly invoking common law theory, the *Hall* court warned that “the testimony of a medical ethicist might be appropriate in some circumstance.” The court suggestively cited two cases. In one, the plaintiff alleged that she told her doctor her relations with her ex-husband were “extremely strained” but that the doctor called the ex-husband to ask about her use of pain medications (which led him to sue for custody of the couple’s children). In the other case, the plaintiff said her chiropractor had become her psychotherapist and had “sexually assaulted” her in violation of a law making it a crime for “an individual who purports to provide professional medical or counseling services to engage in a sexual act with a client or patient.”

Closer examination reveals that neither case seems to presage any consider-

able role for bioethicists in testifying about what the medical standard of care should be. Neither case seems to raise questions about what medical goals are proper or about what medical means are effective. The issue in both cases was essentially whether the behavior complained of was unethical. But that behavior violated such elementary ethical principles that an ethicist might be called simply to report on what standards the medical profession had actually adopted, rather than to opine on what was ethically desirable. Indeed, the behavior was so flagrant that one might wonder whether *any* kind of expert testimony is needed to establish its impropriety.

This leads us to another objection to the *Hall* court’s “professions set professional standards” principle—that professions may indulge themselves in lax standards. How might future courts respond to this objection? Courts are not naive enough to believe that professions always set optimal standards. Judges know Shaw’s aphorism. But they seem to have concluded that they are poorly situated to rewrite medicine’s standards. The most conspicuous effort to do so—a case about when ophthalmologists should test patients for glaucoma—was subsequently attacked on medical grounds and speedily reversed by the legislature. Courts seem, then, to believe that the best is the enemy of the good and that any governmental supervision of medical standards should come from other agencies of the state.

Even if courts were more confident of their own capacity to revise medicine’s standards, they might still doubt bioethicists’ ability to do so. A scent of this motive perhaps wafts from the opinion in *Hall*. The appellate court ruled that the trial court should have excluded the ethicist’s testimony. But the court refused to order a new trial because that error was “harmless.” Among other things, the

testimony was often very abstract, describing such things as the “metaphysical” and “epistemological” issues associated with the “post-Kantian world” and its view that

“perception is the real.” It is not surprising that all of the lawyers essentially ignored this testimony during closing arguments.

Expert testimony is ordinarily admitted only where it rests on some kind of “scientific, technical, or other specialized knowledge” which can “assist the trier of fact.” The Supreme Court has invoked the dictionary definition of “knowledge”—a “body of known facts or any body of ideas inferred from such facts or accepted as truths on good grounds.” Science is the modal case, and scientific validity is tested by asking questions like whether a theory is “derived by the scientific method,” whether it can be and has been empirically tested, and whether it is widely accepted. Did the *Hall* court doubt that ethicists produce “knowledge” of the sort that leads courts to admit expert testimony? Did the *Hall* court doubt that testimony so “abstract” could assist any likely trier of fact?

We have been considering *Hall v. Anwar* as an example of interprofessional competition between medicine and bioethics. But does it also reflect such a competition between law and both those disciplines? The priest-ethicist’s presumed expertise was to say what is right and wrong. Such normative decisions, however, are precisely the work of judges and juries. What, the *Hall* judges may have asked themselves, gives the ethicist a deeper insight into right and wrong than we have? A more legitimate insight? The court twice strongly implied that, had the ethicist’s testimony rested on his religious beliefs, it would have been self-evidently inadmissible. But did the court think that any other basis for his testimony would have endowed it with any more legitimacy than the conclusions of the trial court as the interpreter of the law’s precedent or of the jury as the interpreter of the community’s standards?

1. 774 So2d 41 (Ct App Fla 2000).