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Book Review

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Book Review

Erratum

The citation for this review is *3 RISK 173 (1992)* in most commercial databases.

PETER W. HUBER, GALLIEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM. (Basic Books 1991) [274 pp.] Acknowledgements, index, notes. CIP: 91-70055; ISBN: 0-465-02623-0. [Cloth \$23.00 Harper & Row, 10 E. 53d St., New York, NY 10022.]

GALLIEO'S REVENGE is the latest in a series of Huber's articles and books critical of the U.S. tort system.¹ In it, his basic criticism is that the rules of evidence, as applied by technically illiterate judges, permit the testimony of greedy, dishonest and incompetent expert witnesses to pull the wool over the eyes of ignorant and gullible citizens who happen to be chosen for jury duty. For support, he offers up a series of verdicts that many people have had difficulty accepting and presents evidence on the other side so as to make those decisions appear to be mindless.

No reasonable person would expect juries always to be "right." As discussed in an earlier issue of RISK, the jury system is not perfect, but it is the best we have thus far been able to devise.² Even Huber does not seem to contemplate replacing juries with, e.g., panels of scientists. Rather, based on his carefully selected and anecdotal evidence, he proposes reform of rules designed to keep irrelevant, immaterial and inflammatory evidence away from juries.

Historically, the rule having the most to do with scientific evidence has been the *Frye* test.³ Basically, it excludes expert testimony based upon a theory or technique, e.g., polygraph evidence, failing to have "general acceptance in the particular field to which it belongs."⁴ There are many problems with this rule. For example, to what field does

¹ See, e.g., Huber, *The Bhopalization of U.S. Tort Law*, Issues in Science and Technology, Fall 1985, at 73. For somewhat more veiled criticism, see THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Huber and Litan eds. 1991), reviewed in 2 RISK 279 (1991).

² Bownes, *Should Trial by Jury be Eliminated in Complex Cases?* 1 RISK 75 (1990). (Judge Bownes was appointed to the U.S. Court of Appeals in 1977, after eighteen years experience as a lawyer and eleven as a trial judge.)

³ From *Frye v. U.S.*, 293 F.2d 1013 (1923).

⁴ *Id.*, at 1014.

polygraph analysis or, for that matter, phrenology belong?⁵ Thus, in many jurisdictions the *Frye* rule has been replaced by other rules designed to keep pseudoscience from jury consideration.

Huber apparently believes that these rules are inadequate. Yet, he does not advance a specific proposal. Resurrection of the *Frye* rule, alone, would not seem to accomplish what he seeks. To recover for a compensable injury, a plaintiff need only demonstrate that it is more likely than not that the defendant caused it. This standard of proof is far lower than the 95% confidence level minimally required for most “scientific” purposes and accounts for at least some of the verdicts he criticizes. If such a high standard of proof were adopted, few defendants would be found liable, and the consequences could be worse than those Huber reports.

Indeed, something approximating that level of proof (beyond a reasonable doubt) is required to convict a defendant in a criminal case. Giving that particular jury some benefit of the doubt, the application of such a standard may have resulted in acquittals in the recent police brutality trial in Los Angeles. Fortunately, people rarely react as violently to decisions with which they disagree as people did there. Yet, the situation starkly illustrates the consequences of wide-spread lack of confidence in the legal system.

To avoid a cure potentially worse than the disease, Huber and others who bewail the impact of pseudoscience on jury verdicts should seek more effective strategies for demonstrating that such “science” is the junk they believe it to be. If nothing else, such an approach is far less patronizing of citizens who respond to calls for jury duty.

Thomas G. Field, Jr.

⁵ For a recent analysis of *Frye* and related rules (by a Ph.D. chemist and lawyer), see Grossman, *Science and Scientific Evidence*, 32 IDEA 179 (1992).