THE LAW OF EXPERT EVIDENCE: WHAT EVERY PROSPECTIVE EXPERT WITNESS NEEDS TO KNOW

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WHY ARE EXPERTS HIRED?

There are at least seven good reasons to hire an expert that have nothing to do with that expert actually producing a written report and testifying in court[1]. The role of the expert in this context is in a consultative capacity, rather than testimonial capacity:

1. Providing the lawyer with an understanding of what was being asserted by the other party.
2. Obtaining the expert's assessment of the validity and strength of the opinion being asserted.
3. Giving an assessment of the evidence available to rebut the opinion of the opposing expert.
4. Obtaining expert knowledge and advice to test the qualifications and testimony of the plaintiff's expert.
5. Assisting and putting together a defence.
6. Assisting and developing questions to ask the other expert.
7. Assisting in determining what other evidence might be required in the case.

In all of that, of course, is also the possibility that the expert may prepare a report, in anticipation that oral evidence from the expert will be introduced as evidence at trial.

This paper, and the National Expert Witness Academy lectures and workshops, focus on experts who will be giving evidence, but it is worth noting that there are certainly other roles for an expert to play.

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1 see *Hagblom v. Henderson*, 2003 SK C.A. 40, CanLii

WHO IS AN EXPERT? [2]

An expert is someone who, by experience, has acquired special or peculiar knowledge of the subject about which he undertakes to testify, whether such knowledge has been acquired by study, scientific works, or simply by practical observation.[3] An expert does not need to have a PhD or P.Eng. before or after her name. The only real consideration is whether the person has specialized knowledge beyond the normal understanding and experience of the judge or jury. An expert could literally be a "rocket scientist", if the case required that type of expertise, or it could be a grizzled old trapper with a Grade 6 education, if the case needed that kind of expertise.

EXPERTS CAN OFFER THEIR OPINION

An expert, once qualified as such, may draw inferences and state his opinion. This is very different from any other type of witness, who may only testify as to what she saw, heard, smelled, felt, or tasted.[4]

An expert's function to provide the judge and jury (or arbitrator) with a ready-made inference which the judge and jury, due to the technical nature of the facts, cannot formulate without the expert's opinion. An expert's opinion is admissible to furnish the court with the scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own

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2 This portion of my paper is largely a reprint of an earlier paper that I prepared for an April 2010 conference hosted by the Canadian Defence Lawyers.

3 *Rice v. Socket* (1912), 27 O.L.R. 410 (C.A.)

4 See *R. v. Graat* (1980), 116 D.L.R. (3d) 143 (Ont. C.A.) for a discussion about the rare set of circumstances where a lay witness may give his opinion because it does not call for special knowledge, ie. estimates of time, size and distance, matters as to the identity or condition of a person such as a state of intoxication.

conclusions without help, then the opinion of the expert is unnecessary and will be excluded.[5]

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion, and the opinion, more often than not, will be based on second-hand evidence.[6]

Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence, and to form his or her own opinions on the issues in the case. Only when the trier of fact is unable to reach a conclusion without help does the exception to the opinion rule come into play, and an expert's opinion evidence may be admitted into evidence at trial.

The line between "fact" and "opinion" must always be kept clearly in mind. A witness who happens to be an expert in a particular field may be called simply to give evidence on the facts that he or she observed, without offering any opinion based on those facts. To that extent, and if otherwise admissible, this evidence is not subject to the opinion rule. This type of interaction is commonly seen in a court where, for example, a treating physician is called to describe the injuries that he or she observed on a patient, without offering any opinion on the matter. For example, the blood pressure was 150/110, pulse was 98, eyes were bloodshot, complexion ruddy, and respiration was elevated. It is only when a witness purports to give an opinion on certain facts that the opinion rule

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5 *R. v. Turner* (1974), 60 CR. APP. R. 80, at page 83

6 Per Dixon J. in *R. v. Abbey* (1982), 138 D.L.R. (3d) 217

comes into play, if then, for example, the treating physician goes on to say that this is usual or unusual, or that it represents the indicia of a certain medical condition.

LEADING CASE ON ADMISSIBILITY OF EXPERT EVIDENCE

The unanimous decision of the Supreme Court of Canada in *R. v. Mohan*[7], a criminal case, remains the leading case for both criminal and civil cases on the admissibility of expert evidence. It clarified that the admission of expert evidence depends on the application of the following four criteria:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule; and
4. A properly qualified expert.

Case after case, all across Canada, has applied the four-part test in *Mohan* to determine whether or not expert evidence should be permitted. If evidence is relevant but not necessary, then the court will decline to admit the evidence. The evidence could come from a properly qualified expert and be both relevant and necessary, but might be excluded because of a rule of evidence (say, for example, being entirely founded on hearsay evidence that cannot be otherwise supported, in which case the evidence won't be admitted). The evidence could be relevant and necessary and not subject to any exclusionary rule but won't be admitted if the individual who proposes to give the evidence is not a properly qualified expert, meaning that, unless the witness possesses special expertise, he may not share his or her opinions with the court.

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7 (1994), 89 C.C.C. (3d) 402

DUTY OF AN EXPERT

The Ontario Court of Appeal has emphasized that experts are expected to be neutral and objective when giving their opinion.[8] The testimony of an expert is meant to assist the court, not to bolster the theory of the case presented by one of the two sides. The court does not want to see a "hired gun", but rather a helpful, independent witness.

Effective January 1, 2010, a series of amendments to the *Rules of Civil Procedure* (which outlines the procedural protocols by which parties involved in litigation must govern themselves) came into effect.

Rule 4.01 codifies what was already expressed in the case law; it is the duty of every expert engaged by or on behalf of a party:

1. to provide opinion evidence that is fair, objective, and non-partisan;

2. to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

3. to provide such additional assistance as the court may reasonably require to determine a matter in issue.

This duty prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The duty of an expert is reinforced by a new court form which has been created, Form 53, which is an Acknowledgement of an Expert's Duty. Form 53 must now be attached

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8 See *Conceicao Farms v. Zeneca Corp.* (2006), 82 O.R. (3d) 299; *Conceicao Farms v. Zeneca Corp.* (2006), 83 O.R. (3d) 792, as just one of many such examples

to any report signed by an expert who is intended to be called as an expert at trial. Form 53 is attached to this paper at **Tab A**.

CONTENT OF EXPERT'S REPORT

Rule 53 of the Rules of Civil Procedure provides that an expert report shall contain the following information:

1. The expert's name, address, and area of expertise.

2. The expert's qualifications and employment, and educational experiences in his or her area of expertise (which is likely satisfied by having the expert attach his or her Curriculum Vitae to the report, if the information is not contained in the body of the report directly).

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought, and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue, and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including:

   (a) a description of the factual assumptions on which the opinion is based;

   (b) a description of any research conducted by the expert that led him or her to form the opinion;

(c) a list of every document, if any, relied on by the expert informing the opinion.

7. As mentioned above, an acknowledgement of the expert's duty, Form 53, signed by the expert.

A sample template/checklist that ensures compliance with the amended Rule 53 is attached to this paper at **Tab B**. This is but one of my templates, but it should at least serve as a starting point.

CAN AN EXPERT TESTIFY ON MATTERS NOT RAISED IN THE REPORT?

While the decision is ten years old now, lawyers continue to be governed by the Ontario Court of Appeal's decision in *Marchand v. The Public General Hospital Society of Chatham*[9], which clarified,

> Rule 53.03 governs expert opinion evidence and provides that a party who intends to call an expert witness at trial shall...serve on every other party to the action a report, signed by the expert, setting out his or her name, address, and qualifications, and substance of his or her proposed testimony. No expert witness may testify, except with leave of the trial judge, unless this rule has been complied with.

The Court of Appeal held that the "substance requirement" of Rule 53.03 must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Keep in mind that, when *Marchand* was decided, Rule 53 provided that the expert's report must be served on opposing counsel not less than ten days

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9 *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLii 16946

before the commencement of trial. Since then, we went to a system where the expert's report must be served 90 days before trial, and have now embarked on a system, effective January 1, 2010, where the expert's report must be served at least 90 days before the pre-trial. The desire to prevent a party from being ambushed has only strengthened in the decade since *Marchand* was decided.

As stated by the Court of Appeal:

> ...an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report, but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying Rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

VOIR DIRE

A *voir dire* is essentially a hearing within the trial to determine the admissibility of evidence or the competency of a witness to give certain evidence. As it relates to an expert witness, the *voir dire* pertains to the determination that an expert is in fact qualified to offer an opinion on a particular subject matter, and determines, with precision, the area of expertise for which the expert has been tendered. As the expert, you can think of the voir dire as the procedural step where your qualifications are either accept or rejected by the court and you are permitted or refused permission to offer your opinion.

The party who intends to call someone as an expert witness leads evidence from that individual in the witness box, and would typically walk the expert through his or her

curriculum vitae, focussing on all of the areas of relevance that would suggest that the individual has an expertise that would be beneficial to the court.

The following types of evidence would typically be led by the party wishing to call the individual as an expert.

- professional qualifications
- publications (gross number and particular topics of interest)
- experience
- any relevant teaching
- who taught the expert, ie. any famous people in the field
- research
- the number of times previously qualified to give opinion evidence

The lawyer should know ahead of time, and should map out with the expert, the precise areas of expertise where it is wished for the expert to be qualified to testify. At the end of the examination-in-chief as to qualifications, the lawyer who engaged should offer you to the court as an expert witness qualified to give an opinion within your specific area of expertise. The lawyer would then sit down and the lawyer for the other party in the lawsuit would have an opportunity to cross-examine you, perhaps in an effort to narrow or eliminate your testimony.

Many times, the opposing counsel will recognize that the individual is going to be accepted as a witness and will not challenge the qualifications. There may be times

where the area of expertise is narrowed down through the cross-examination process, and there are times when an expert witness is disqualified completely because that individual lacks expertise, say, for example, because the area is novel or "junk science", or where some of the other factors in *R. v. Mohan*, discussed above, apply.

Consequently, if you are acting as an expert witness for the first time, or have not been challenged on your expertise in the past, do not be surprised that your testimony could be excluded in its entirety, depending on what it is that the party who retains you hopes to have you say *vis a vis* your expertise.

TIMING FOR DELIVERY OF REPORTS

As a practice point, it is helpful for you to understand that the lawyers who hire you are themselves governed by rules concerning the appropriate timing for the delivery of an expert report.

Previously, if an expert is to be used as an expert witness in a proceeding, he or she was obliged to deliver a written report to be served on all parties no less than 10 days before the date of the trial. Rule 53.03 has now been amended to provide that, if a party intends to call an expert witness at trial, the expert report must be delivered not less than 90 days before the pretrial conference. Unfortunately, as an expert, you may well have a very short timeline thrust upon you by the party who seeks to engage you. A report that is not delivered in a timely way may not allow that witness to testify.

You may also be asked to respond to a report delivered by an opposing expert and may have to prepare your own written response, again, with a very short time line.

CONCLUSION

Expert witnesses occupy a position of privilege in our legal system. With that privilege comes the corresponding obligation and responsibility to be fair, neutral, and to comply with the various rules concerning the contents of a report. You must do what is right, not what is easy, and may at times need to be very candid with the lawyer engaging your services that your opinion does not accord with his or her view of the case.

Being an expert witness goes far beyond the preparation of a written report. If you are interested in being consulted as an expert, but do not want to be asked to testify, my advice is that you decline the engagement up front. You cannot be an expert without also having the conviction to stand up in court and explain your opinion and answer the questions from opposing counsel who seeks to challenge your opinion. The fact that you are participating in this National Expert Witness Academy suggests that you are indeed serious about all aspects of the role of experts - including the need to testify – and will no doubt leave with you a much clearer understanding of expert evidence.

FORM 53

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is ..... *(name)*. I live at ..... *(city)*, in the ..... *(province/state)* of ..... *(name of province/state)*.

2. I have been engaged by or on behalf of ..... *(name of party/parties)* to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date .....

_____

Signature

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

RCP-E 53 (November 1, 2008)

EXPERT REPORT CHECKLIST

- AMENDED *RULES OF CIVIL PROCEDURE*

IDENTIFICATION

- Name:
- Address:
- Area of Expertise:

QUALIFICATIONS IN AREA OF EXPERTISE

- Education, Employment, Expertise:

  (or attach Curriculum Vitae)

- Intended Area of Expertise:

INSTRUCTIONS PROVIDED TO EXPERT

- Summarize the request made of the expert:

- Identify the nature of the opinion being sought and each issue in the proceeding to which the opinion relates:

EXPERT'S FOUNDATION FOR OPINION

- List every document which was considered and relied upon:

- Provide a summary of the relevant factual assumptions made or given to the expert:

- Describe any relevant research which the expert considered:

EXPERT'S ANALYSIS AND OPINION

- Identify the issues:

- Conduct the necessary analysis:

- Provide the opinion on each issue:

SIGNATURE OF EXPERT

- The report is to be signed by the expert and must be accompanied by the Acknowledgment of Expert's Duty (Form 53)

Dated: _____