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PERSONAL INJURY LAW

Expert Witnesses: The Who, What, When And How Of Retaining Experts And Making Them Effective For You

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INTRODUCTION

Expert witnesses are an integral part of the litigation process. The majority of, if not all, personal injury claims involve the use of experts to assist with the resolution of a claim or to adduce evidence at trial.

This paper will focus on expert selection; the pitfalls of experts' reports and how to avoid them; how to effectively prepare an expert for trial; and, how to frame the evidence at trial.

EXPERT SELECTION

The purpose of an expert witness is to elicit evidence about the facts of the case, more specifically, opinion evidence based on the expertise of the witness.

In *Regina v. Abbey*, [1982] 2 S.C.R. 24, Mr. Justice Dickson (as he then was) of the Supreme Court of Canada stated the following with respect to the role that expert's play in the trial process (at p. 42):

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with 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 conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R.

80, at p. 83, per Lawton L.J.). 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.

Therefore, an expert should have "first-hand" knowledge of the facts of a case, but this is not a necessity because it is the expert's opinion that the Court is interested in hearing. A familiarity with the facts in the case however, will help the witness form his/her opinion.

Based on the above, it is evident that the only time expert evidence is necessary is when the judge and/or jury would not be able to adequately formulate an opinion on the facts of the case without the assistance of the expert opinion.

Selecting and Retaining an Expert

A crucial aspect of selecting an expert witness is that the expert must present as impartial, knowledgeable, coherent and credible. Unfortunately, this is not an easy task. Experts may have one of these qualities or none.

In determining which expert to use, counsel should consider the expert's level of expertise, but more importantly, how the expertise relates to the evidence counsel wishes to elicit at trial. Consideration should also be given to whether or not the expert will be available for the trial, whether they are able to commit to the time required to prepare their testimony as well as to assist counsel with responding to the opposing party's experts, and the cost benefit analysis in retaining that specific expert.

Communicating With Your Expert at an Early Stage

It is a good idea to retain an expert in the early stages of litigation, especially if the matter involves a number of technical issues. If this is the case, it is recommended that an expert be retained even before the examinations for discovery in order to help counsel formulate the type of questions to be asked at the examination for discoveries. Otherwise, experts may be retained at any stage of litigation, but it is more beneficial to retain the expert early on as it will assist in forming your damages brief in preparation for mediation or trial.

An expert may be at the top of the list of experts in their field, but unable to coherently express a complex topic in layman's terms to a jury. It is important that counsel take the time to scope out the specific type of expert witness they wish to rely on at trial and consult with other lawyer's to obtain information about their experience at trial with the specific expert. Counsel can also conduct research about the expert in order to gain a more thorough understanding of the expert's level of experience in giving evidence at trial, and/or interview the expert in order to get a sense of how he/she will perform on the stand.

If the expert has provided evidence at a previous trial before, it is in counsel's best interest to research how the expert's evidence was perceived by the court. Was he/she credible, did the case rely heavily on his/her opinion or was his/her opinion dismissed by the Court?

It is important to know the answer to such questions before retaining an expert, if possible.

The Expert's Curriculum Vitae

In selecting an expert, counsel must review the expert's CV and determine whether the expert can give the opinion that counsel is seeking without going outside the parameters of his/her area of expertise.

Judges are the gatekeepers of expert evidence to be admitted at trial. The Judge will make sure that the opinion the expert provides falls within his/her expertise, failing which the expert may be disqualified from providing the opinion.

The expert's CV will undoubtedly be an exhibit at trial. Therefore, the CV must be accurate, up-to-date, clear and of course, impressive. Often times, experts will include a list of everything they have done in their careers, without putting any thought into the chronology and aesthetics of the CV. It is a good idea to review the expert's CV and make suggestions for improving its presentation, and correcting any potential grammatical or other errors that should be rectified before producing it to the opposing party.

The Expert's Publications

Experts have frequently published a number of articles/studies in professional journals, which can bolster his/her credibility in giving opinion evidence on the same or similar topics. However, it is important to ensure that the expert's previous opinions are not contrary to his/her current opinion being elicited in Court.

In this same vein, research into previous opinions given by the expert in Court and the Court's treatment of the expert's evidence will assist in determining whether the expert is the right fit for your case.

PITFALLS OF EXPERT'S REPORTS HOW TO AVOID THEM

Report preparation is crucial to the evidence that the witness is going to give. The expert's report outlines the theory of the case from a medical or "scientific" perspective, and defines the scope of what the expert can testify about.

It is paramount that the expert provides an unbiased opinion based on his/her education, training and experience. The Court is quick to criticize the testimony of experts who take on the role of “advocate” and attempt to use their expertise to tell the story of the victim. Moreover, the expert’s evidence will be seen as biased and seem questionable to the Jury.

The Rules of Civil Procedure in Ontario

In Ontario, the Rules of Civil Procedure (hereinafter referred to as “the Rules”)¹ govern the duty of an expert under Rule 53. Since January 1, 2010, expert’s testifying at trial or providing an expert opinion with a report is required to provide a completed “Form 53”, which states that the expert acknowledges his/her duty to the Court in providing the report or the testimony he/she will be giving at trial.

Rule 53.03 provides that the following must be included in an expert’s report:

1. The expert’s name, address and area of expertise;
2. The expert’s qualifications, employment and educational experience in his or her areas of expertise;
3. The instructions provided to the expert;
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates;
5. The expert’s opinion with respect to each issue; and
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. The description of any research conducted; and
 - c. A list of every document relied upon.

¹ Rules of Civil Procedure, R.R.O. 1990, Reg. 194: Rules of Civil Procedure under the *Courts of Justice Act*, R.S.O. 1990, c. C.43

Instructions to The Expert Witness

One of the most important documents forming part of the trial brief will be the letter of instruction to the expert witness. The purpose of this document is to provide specific instructions as to what it is that you require of your expert, but should be drafted keeping in mind that it must be produced to the opposing party before the commencement of trial, and/or during the cross examination of the expert.

As such, it is extremely important that the letter of instruction is accurate and more importantly, that the questions being asked of the expert are formulated with the view that opposing counsel as well as the Court will be putting this document under the microscope.

There are times when counsel may require the assistance of the expert in formulating the appropriate questions to be posed. A telephone conference with the expert prior to drafting the letter of instruction may be required in the circumstances.

I would encourage counsel to include in every instruction letter a reminder that the role of the expert is to help the Judge and/or Jury in understanding the complex field in which the expert has his/her expertise.

Draft Reports

The concept of counsel reviewing draft reports prepared by experts was an area of debate amongst the Bar until 2014 when the decision in *Moore v. Getahun*² was released.

Facts of Moore

The plaintiff had been in a motorcycle accident and was treated for a wrist fracture by the defendant orthopedic surgeon. The plaintiff suffered permanent damage to the muscles in his arm, which he alleged was caused by the defendant's negligence.

² *Moore v. Getahun*, 2014 ONSC 237

At trial, the defendant's expert witness indicated during cross-examination that he had sent a draft of his report to the defendant's counsel for review and had produced his final report after an hour-and-a-half conference call with counsel. Madam Justice Janet Wilson expressed concern over this, and questioned the expert on his draft reports and meetings with defendant's counsel. Justice Wilson also instructed the expert to provide the court with any records relating to the drafts and communication with counsel, leading to a detailed review of the expert's draft report and the notations and changes he made as a result of discussing the drafts with defendant's counsel.

In her reasons, Justice Wilson preferred the evidence of the plaintiff's expert over that of the defendant's expert. She found that the 2010 changes to rule 4.1.01(1) and rule 53.03 of the *Rules of Civil Procedure*, governing the use of expert witnesses at trial, had introduced a "change in the role of expert witnesses." Justice Wilson also held that the practice of discussing draft reports with counsel should stop as it "is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality."

Justice Wilson did not explain which changes made by the expert to his report following discussion with counsel were significant, but held that if any changes are made as a result of counsel's communication, they should be fully disclosed in writing.

Madam Justice Janet Wilson wrote:

I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.

If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.

On Appeal, Justice Robert J. Sharpe of the Ontario Court of Appeal, writing for the Court, disagreed with the trial judge's statement that the 2010 changes had introduced a change in the role of the expert witness, and focused on the following:

- Consultation between counsel and expert witnesses in preparing expert reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims;
- Draft reports, notes and records of any consultation between experts and counsel, even where the party intends to call the expert as a witness, are protected by litigation privilege;
- Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions; and
- Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of the draft reports and other communications between counsel and expert witnesses. Consultation between counsel and an expert witness on an expert report does not meet this threshold.

Communications with Experts, as per *Moore*

On appeal, the appellant and various interveners argued that the trial judge erred at law in holding that it was improper for counsel to assist an expert witness in preparing the expert's report. The Court of Appeal described the changes made to the expert's report as relatively minor editorial and stylistic modifications

intended to improve the clarity of the reports. The Court also found no major changes in terms of substance to the final report and no evidence was found to show that this report reflected anything other than the expert's own genuine and unbiased opinion.

The Court of Appeal was clear that, "banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority." Instead, the Court of Appeal observed that, "expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."

The Court of Appeal stated that the objectivity of expert witnesses was already enshrined in law and practice, for example the professional and ethical standards of both lawyers and witnesses, and by a court's ability to reject or give less weight to an expert's opinion which can be discredited on cross-examination.

Justice Sharpe went on to say at paragraph 52:

As I read the amendments and the Osborne Report recommendations, the changes were intended to clarify and emphasize the existing duties of expert witnesses. I agree with Lederman J.'s statement in Henderson v. Risi, 2012 ONSC 3459 (CanLII), 111 O.R. (3d) 554 (S.C.), at para. 19, that these changes represent a restatement of the basic common law principle that it is the duty of an expert witness "to provide opinion evidence that is fair, objective and non-partisan." Those common law duties were summarized in an often cited passage from National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd. ("The Ikarian Reefer"), [1993] 2 Lloyd's Rep. 68, at p. 81 (Eng. Q.B. Comm.), rev'd on other grounds but endorsed on this point, [1995] 1 Lloyd's Rep 455 (Eng. C.A. Civ.), at p. 496:

1. *Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation [citation omitted].*
2. *An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise [citation omitted]. An expert witness... should never assume the role of an advocate.*

The 2010 amendments to rule 53.03 did not create new duties but rather codified and reinforced these basic common law principles.³

To save time and costs, most counsel will have an informal discussion with the expert prior to the report being finalized and produced. The conversation can be about opinions, the language to be used in the report, the structure of the report and the length of the report. Remember, experts are not lawyers and may not appreciate the intricacies of using a particular word or phrase over the other and the connotation they may have for a Judge or Jury.

It is also prudent to have such discussions with your expert because you may find that your expert is adamant about using particular words or phrases, which may not be helpful to your case. If you can't come to an understanding, it is better to know at the report preparation stage, while you still have an opportunity to seek out and retain another expert.

³ Moore v. Getahun, 2015, ONCA 55 (CanLII)

Providing a Relevant Background for Your Expert and Supplementary Reports

Prior to the preparation of the report, it is crucial that your expert receive all the relevant documents forming the basis for your expert's opinion. This is seminal to ensuring that the expert has a chance to provide a well formed opinion. The last thing counsel wants to see at trial is his/her expert's opinion being undermined on cross-examination because counsel failed to provide or advise his/her expert with critical information that would have affected the expert's opinion.

To this effect, counsel should ensure that the expert, whether after an initial report has been provided or before the commencement of trial preparation, has been provided with any and all new information received that would affect the expert's opinion.

PITFALLS OF EXPERT'S REPORTS HOW TO AVOID THEM

The Performance is Just as Good as The Opinion

Many experts are world renowned for their area of expertise, their research and contribution to that field. Unfortunately, being an expert does not automatically make one a good presenter or witness. At the end of the day, the expert's opinion is going to be presented to the Court and if your expert suffers from poor presentation skills, you will have a problem.

This is the reason why expert preparation is key to a successful delivery in the courtroom. The expert must understand each and every question that is being asked of him/her, the answers to those questions and more importantly, the questions that will be asked of them on cross-examination.

The evidence must come out in a clear, coherent and organized manner. The expert must speak in a clear and loud voice with a neutral tone and in a moderate pace when answering questions. Some experts will have

testified in Court before and will be better prepared for this while others may be giving evidence for the first time. Some experts' personalities may make them natural in presenting their opinion very well, while others may struggle to do so. Regardless of the amount of experience your expert has, you must consider the preparation time with each expert on a case by case basis. Take as much time as necessary to ensure that the expert is prepared for their debut in Court when that curtain rises on the day of trial.

Not only is it important for you to prepare your expert, but the expert him/herself should spend some time preparing for trial as well. If the expert is not prepared for the trial, it will be obvious to the trier of fact and will weaken the impact of their evidence.

Counsel should remind the expert to stay within his/her area of expertise when answering questions. It may be too stringent to tell the expert to be on guard at all times, but it is one of the best pieces of advice counsel can give to their experts. The expert should always be on their toes for questions that may elicit answers that fall beyond the scope of their area of expertise.

Some tips for your expert in examination-in-chief:

1. Speak directly to the Judge or Jury;
2. Teach the Judge or Jury about your area of expertise;
3. Keep your cool in the witness box;
4. Be courteous and professional in cross-examination; and
5. The Judge and Jury are judging you, be as likeable as possible (i.e., avoid arrogance).

Cross-Examination of the Expert

Although it is important for the expert to be prepared for their examination-in-chief, it is even more important for the expert to be prepared for their cross-examination by opposing counsel.

It is not possible for you to know every question that opposing counsel will ask of your expert, but what you will know is that your expert's cross-examination will not be a walk in the park. Your expert will be put to scrutiny on their background, opinion and character. The best way to prepare your expert for the cross-examination is to provide them with as much information as possible about the subject areas that opposing counsel will be questioning the expert on. Most importantly, counsel should provide the expert with the opposing expert's opinions and the strengths and weaknesses of those opinions.

Some tips for your expert on cross-examination:

1. Do not readily agree that various text or other works are authoritative – if an expert does not agree to the authority of a particular written work, he/she cannot be cross-examined on it, nor be impeached by their previous opinion;
2. Beware of new evidence – if there is new evidence that has come to light since the expert provided his/her opinion, the expert should be provided with updated facts in order that he/she may respond accordingly to the question in that this new information was not available to the expert at the time that he/she prepared his report; and
3. Form an opinion about the opposing party's expert – formulating an answer to whether or not the expert is familiar with, respects, or is aware of the works of the opposing party's expert before being cross examined will provide better results as the expert will have had a chance to research the opposing party's expert and to formulate an answer to this often posed question.

HOW TO FRAME THE EVIDENCE

The Examination-in-Chief of the Expert

As with any witness, counsel should bear in mind the basics such as keeping questions short and asking one question at a time. There are things you can do, however, to frame your expert's evidence in the best light.

If the expert's report is well formatted, it may work in counsel's best interest to follow the format of the report in asking questions on the examination-in-chief.

The following is a general outline of the questions for examination-in-chief:

1. Who he/she is;
2. What he/she was asked to do;
3. What he/she looked at and/or was given;
4. What he/she did and/or examined;
5. What he/she found;
6. What were his/her conclusions and opinions; and
7. Why did he/she reach the conclusions and opinions that he/she did?

This will provide a road map to the Judge and Jury in understanding the evidence that you are asking them to eventually accept.

Many lawyers are of the opinion that the last question in an examination-in-chief is like a big finish of a theatrical play. The purpose of this is to ensure that the Judge and Jury hear a well put together summary of the expert's opinion. It is important to note that once you have the answer to this question, and your expert has effectively summarized his/her opinion in a coherent manner, no further questions should be asked. In this way the last thing in the mind of the Judge and Jury will be your expert's opinion.

CONCLUSION

Preparation, preparation and more preparation is the key to success. This holds true for the fact that whether you are at the stage of selecting your expert, having your expert prepare a report, preparing your expert for trial or deciding how to frame your expert's evidence, preparation will go a long way to the successful presentation of your case at trial.

For further detailed information regarding this paper or any of the topics discussed herein, please contact Renée Vinett or Laleh Hedayati at Howie, Sacks & Henry LLP.

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