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To Be or Not to Be... a (Truly Qualified) Expert Witness

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The practical definition of an expert witness is someone who wears a suit and a tie, carries a briefcase, and comes from over 300 kilometres away. When I was a trial judge, I found that there were supposed to be experts on every topic under the sun (and sometimes even within the shadows of the dark side of the moon). Two questions come to mind: (1) How many of these proposed experts were helpful, let alone necessary?; and (2) Was the briefcase just an expensive lunchbox?

While many trials might benefit from expert testimony, it is interesting to look at how many of these proffered experts were in fact truly qualified to testify. Allow me to expand on some of the pitfalls and provide some insight as to what is required in order that a trial proceed in a fair and efficient manner to reach a just result.

There have been some refinements to the test since Sopinka J.'s advice in ***R.* v. *Mohan***, [1994] 2 S.C.R. 9. However, the summary of that case succinctly frames the issues:

> Admission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. Relevance is a threshold to be decided by the judge as a question of law. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate

3. the known or potential rate of error or the existence of standards; and
4. whether the theory or technique used has been generally accepted.

In ***R.* v. *Trochym***, [2007] 1 S.C.R. 239, the Supreme Court of Canada ruled that post-hypnosis testimony should not be allowed without the jury hearing expert evidence as to its reliability.

Dickson J.'s observation in ***R.* v. *Abbey***, [1982] 2 S.C.R. 24 at p. 42 is important when considering whether expert testimony is warranted:

> 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.'

I would note in passing that it is not necessary to have an expert merely make some arithmetical calculations; yet there have been trials that would have benefitted from an adding machine rather than a hocus-pocus witness.

In *Smith* v. *Inco Limited*, 2009 CanLII 63374 (ON S.C.), Henderson J. emphasized at para. 28 that the test is not whether the testimony is helpful, but whether it is necessary. He went on to state in the next paragraph:

> I accept that there is a certain expertise exhibited by Hilsee in inputting the data, organizing the data, creating the spreadsheets, and creating search engines; and that technical organizational expertise is beyond most triers of fact. However, it is not necessary to have the data organized in this way in order to determine the issues. That is, the technical expertise of being able to create an organized spreadsheet is not necessary for a judge to read, identify, organize and make findings of fact regarding the data in question.

The criminal courts have been fertile fields as to how to address expert opinion evidence. However, it should be noted that all of the criminal case analyses are equally applicable to civil litigation. Indeed it is the civil courts (with their unfortunate tendency to "relax" the rules of evidence generally) that need to more carefully consider the admissibility of such evidence. All too often in "judge alone" trials, if proffered evidence is questioned, one hears the refrain of: "Well, I will let it in and it will just go to weight." *The fact of the matter is: if it is not admissible, it does not even get put on the weighing machine.* I would therefore take issue with the seeming relaxation of that when Binnie J. observed at page 612 of *R.* v. *J.-L.J.*:

> ... the court has emphasised that the trial judge should take seriously the role of "gatekeeper." The admissibility of the expert evidence should be

and that, if accepted, the area of expertise be suitably restricted. Too often all counsel in a case will accept a witness as an expert in a wide-open category that allows the witness to wander outside the scope of his qualification. In ***Canadian 88 Energy Corp.* v. *Union Carbide Canada Inc.***, 2009 ABCA 126 (CanLII), the witness was not qualified as an expert in corrosion, but was acknowledged in certain other areas. An expert may be qualified on the basis of the "school of hard knocks" experience, as opposed to being formally trained, as in ***R.* v. *N.O.***, 2009 ABCA 75 (CanLII). An expert, if properly qualified by training, study and/or experience, may opine on a standard notwithstanding that qualification is retroactive in the sense that it is subsequent to the time of the standard in question, as in ***Cleveland* v. *Hamilton Health Science Corporation***, 2009 CanLII 59152 (ON S.C.).

In ***R.* v. *Candir***, 2009 ONCA 915 (CanLII), Watt J.A. noted at paragraphs 59-60:

> [59] A party who meets the requirements of a listed or the principled exception to the hearsay rule removes its exclusionary features as a barrier to admissibility but ascension over one barrier to admissibility does not preordain reception. A trial judge has a residual discretion to exclude otherwise admissible evidence, including admissible hearsay, where its impact on the trial process (costs) exceeds it value as to the correct disposal of the litigation at hand (benefit). The prejudicial effect of the evidence may overwhelm its probative value. Introduction of the evidence may involve a significant expenditure in time, not commensurate with the value of the evidence. The evidence may mislead because of its effect on a trier of fact, especially a jury, may be disproportionate to its reliability...
>
> [60] The general exclusionary rule described in the preceding paragraph is sufficiently expansive to permit exclusion in order to prohibit or reduce the needless presentation of cumulative evidence. This forensic piling on of evidence by the acre unnecessarily lengthens trials, defuses their focus and diverts the attention of the trier of fact. Cumulative evidence, whether testimony, exhibits or both, often occupies a borderland around the periphery of the case, adding nothing to the contested issues, preferring instead to suffocate that trier of fact with the uncontroversial or marginal.

So if a trial judge in a criminal case has the discretion to exclude otherwise admissible evidence, then *a fortiori* a trial judge in a civil trial may take that action. It is highly desirable for counsel to arrange with the civil court in advance of the trial how and what expert evidence will be advanced and permitted. Traditionally, this was considered to be the exclusive jurisdiction of the actual trial judge. However, if this is not feasible, it would be helpful for all counsel to agree that a "case management" judge be authorized to take on this responsibility.

There is a continued need to scrutinize the evidence as delivered by a qualified

factum to be provided to supplement oral argument.

It is an unfortunate reality that some counsel are perhaps so overwhelmed by the seeming complexity of the case that they present proposed expert witness upon expert witness. This has led to many trials deteriorating into a battle of the experts and of how many experts can dance on the head of a pin. The situation in Ontario is that according to the *Ontario Evidence Act*, each party is restricted to no more than three expert witnesses, except with leave of the court. That is three experts in total, not the bastardized view that the restriction was merely three experts on *each* issue or topic. See ***Bank of America* v. *Mutual Trust Co.***, 1998 CanLII 14679 (ON S.C.), a case where I was prompted to analyze this question because one side was proposing 13 experts — which of course prompted the other side to retaliate (out of "fear of the unknown") with a substantial number in return. This case was favourably commented on by Hughes J. in *Eli Lilly and Company* v. *Apotek Inc.*, 2007 FC 1041 (CanLII) concerning controlling numbers of experts in Federal Court cases.

Then of course there is a special place in one of the levels of *Dante's Inferno* reserved for the biased proposed expert. A favourite of mine was the less-than-neutral and objective proposed witness in *Bank of Montreal* v. *Citak*, [2001] O.J. No. 1096 (S.C.J.). He admitted that he always took "the position of advocate for my client," and that "I'm paid a good fee," but insisted nevertheless that his advocacy views would never interfere with his independence or objectivity. Advocacy should never be dressed up as expert opinion. I did, however, admire him for his honesty when he said in his written material: "It is true, I do not have special expertise in receiverships." So I took him at his word!

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