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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 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

with its value or if it can influence the trier of fact out of proportion to its reliability. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence. Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process, or will confuse the jury.

Expert evidence, to be necessary, must likely be outside the experience and knowledge of a judge or jury and must be assessed in light of its potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility the evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts.

Expert evidence can be excluded if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. The evidence must be given by a witness who has shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In summary, expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Sopinka J. referred to *R.* v. *Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.) in which Moldaver J. applied a threshold test of reliability as to what he described as "a new scientific technique or body of scientific knowledge" (namely, "What degree of reliability has the proposed scientific technique or body of knowledge achieved?") along with two other factors to be considered in such circumstances: (1) Is the evidence likely to assist the fact-finder (jury or judge) in its fact-finding mission, or is it likely to confuse and confound?; and (2) Is the fact-finder likely to be overwhelmed by the 'mystic' infallibility of the evidence, or will the fact-finder be able to keep an open mind and objectively assess the worth of the evidence?

Binnie J. also noted in ***R.* v. *J.-L.J.***, [2000] S.C.R. 600 at p. 615 that the Canadian courts were open to novel science (as mentioned in *Mohan*), but subject to the "reliable foundation" test that the US Supreme Court laid down in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993). This would cover:

1. whether the theory or technique can be and has been tested;
2. whether the theory or technique has been subjected to peer review and publication;

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

> scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all the frailties could go at the end of the day to weight rather than admissibility.

Similarly, in *Johnson* v. *The Town of Milton* (2008) 91 O.R. (3d) 190 (C.A.), Moldaver J.A. observed that there may be a more flexible approach to admissibility in civil cases if it were a judge alone trial, as opposed to a jury trial. But he certainly did not approve of "anything goes," pointing out that this approach is legally incorrect and wastes time. In *Wightman c. Widdrington (Estate of)*, 2009 QCCA 1542 (CanLII), it was noted that I had observed in another case when speaking at the justice system, that it "...is to be there for everyone — everyone is entitled to their day in Court, but not someone else's day. Trials should not be unnecessarily extended by counsel attempting to overload their case by superfluous 'experts.'"

The criminal courts are also "green" in their way — that is, they believe in recycling names. Cases in point are ***R.* v. *Abbey***, 2009 ONCA 624 (CanLII) and ***R.* v. *Mohan***, 2010 ONCJ 52 (CanLII) — the names are the same, but the accused are different from those in the earlier cases. In the *Abbey* case, the issue was whether an expert could give an opinion on the meaning of a tear drop tattoo worn by a gang member. There were alternative meanings: (i) that there had been a death of a fellow gang member or family member of the tattoo wearer; (ii) that the tattoo wearer had served time in prison; or (iii) that the tattoo wearer had murdered a rival gang member. On appeal, the expert was permitted to give all possible meanings, but not an opinion as to the which of the three meanings seemed most likely (namely murder — remember the admonition about usurping the role of the trier of fact). Doherty J.A. at para. 70 stated that the secondary use of this opinion evidence would not go directly to the ultimate issue of identity and did not invite the jury to move directly from acceptance of the opinion to a finding of guilt. In the *Mohan* case, which involved impaired driving, the accused was able to delay the conclusion of his impaired driving trial for six months as a result of his objections regarding the adequacy of a toxicology report. However, after noting that the accused had admitted he was so drunk he remembered nothing of the crash, with the result that the toxicology report was redundant, the judge observed in a single footnote that the accused did not present any expert evidence when he testified at the trial.

In *Consulate Ventures Inc.* v. *Amico Contracting & Engineering (1992) Inc.*, 2010 ONSC 2181, Newbould J. ruled that the expert must testify within his own knowledge and not merely assemble in his report the conclusions of other witnesses. The evidence of the conglomerator would be unreliable as there would not be the opportunity for testing that evidence under examination. Further, one would not know what information was provided to these other persons.

It is important that the qualification of an expert witness be carefully scrutinized

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

expert as it is necessary to evaluate the potential prejudicial effect on the trial fairness: ***R.* v. *Ranger***, 2003 CanLII 32900 (ONCA).

In ***Maple Leaf Foods Inc.* v. *Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.), Weiler J.A. for the Court, at pp. 194-5, observed that I was correct in not admitting evidence, saying:

> Farley J. ruled that the qualifications of the experts related to corporations, their securities, take-over bids and directors' obligations. He declined to receive the experts' reports on three bases: (i) that the opinions expressed related to domestic law, a matter upon which a court ought not to receive opinion evidence; (ii) that there was no specialized and standardized body of conduct to study in this area; and (iii) that he did not need the assistance of the experts and understanding the evidence or the concepts and principles involved.

I had noted *Sopinka, Lederman and Bryant, The Law of Evidence in Canada* (1992) at page 545 that: "Questions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence." Of course, if the trial involves foreign law, unless it is otherwise proven by a qualified expert in the laws of that foreign jurisdiction, it is presumed that the foreign law in question is identical to domestic law: ***ABN Amro Bank N.V.* v. *BCE Inc.***, 2003 CanLII 64276 (ON S.C.) at para. 13.3.

I must say that I was the proposed beneficiary of more than my fair share of expert witnesses who would assist me with respect to domestic law. In each case I was obliged to say that, like it or not, I, as the trial judge was the expert in Ontario and Canadian law. While I sympathize with the concern of the judge in ***Taubner Estate (Re)***, 2010 ABQB 60 (CanLII) at paras. 336-337:

> [that the proposed lawyer expert] knows far more about corporate and commercial law than I, and his evidence would be of assistance to me. It is unclear why the lawyer's affidavit in *R.* v. *Q.A.M.*, 2005 BCCA 615 (CanLII) had been ruled inadmissible. The B.C. Court of Appeal's approach was novel: reject the affidavit but treat it as if it had been a submission by counsel. I need not fall back on that approach here, as I have ruled Mr. Tod's report in evidence to be admissible.

However, the B.C. Court of Appeal's approach is simply a variation of what I believe the proper approach should be — recognizing that in this age of specialization, it is relatively unlikely that a judge of a court of general jurisdiction will have been a specialist in the area involved in the trial. It is the role of counsel appearing to try to persuade the judge as to what should be the law and its correct interpretation. If lead counsel is not confident of being able to so educate the judge, then that counsel should consider retaining the "expert" as co-counsel to deal with that area in argument. Alternatively, the expert could assist lead counsel in the preparation of a memorandum of law or

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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