The Expert Witness

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In This Issue

In this issue of The Expert Witness, Christopher Bruce investigates the principles that the courts have developed to determine whether experts and their evidence should be admitted into court.

He argues that these principles can usefully be divided into four categories: the requirement that expert testimony be *useful*; the identification of whether the expert is *qualified*; the determination of whether the expert's testimony is *reliable*; and the evaluation of the *weight* that is to be attached to the expert's opinion.

In his article, Dr. Bruce reviews these principles and summarises a number of recent rulings in Canada and the United States with respect to each of them. He finds that the courts are less likely to disqualify witnesses than they are to accept a witness' qualifications subject to the understanding that opposing counsel will exercise its right to subject the witness to vigorous cross-examination, or to caution that the expert's testimony will be given reduced weight.

Economica News

LexisNexis has asked Economica to write the sixth edition of our book *Assessment of Personal Injury Damages* (Bruce, C.J., K.A. Rathje, L.J. Weir, 2011, 5th Edition, LexisNexis). Derek Aldridge will be joining us as a co-author. The projected publication date is Spring 2019.

For this addition, we will include information from the 2016 census, and new research into a range of issues including:

- economy-wide productivity growth,
- aboriginal earnings/economic outcomes,
- age at retirement,
- the impact of sexual abuse on adult earnings, and
- new information regarding the determination of the discount rate.

Our hope is to provide updated and relevant information useful to the estimation of loss in personal injury, wrongful death, wrongful termination, and medical malpractice.

Admissibility of Expert Evidence: Personal Injury Litigation

Christopher J. Bruce

The admission of expert evidence has required that the courts maintain a fine balance between, on the one hand, caution against the possibility that witnesses may usurp the court's role of forming opinions and drawing conclusions; and, on the other hand, recognition of the fact that juries and triers of fact may lack the technical expertise to draw inferences from the facts as presented.

This dichotomy has led the courts and legal commentators to develop a lengthy set of principles concerning the admissibility of experts and their evidence. These principles can usefully be divided into four categories: the requirement that expert testimony be *useful*; the identification of whether the expert is *qualified*; the determination of whether the expert's testimony is *reliable*; and the evaluation of the *weight* that is to be attached to the expert's opinion.

In this article, I summarise some recent rulings in Canadian and American law with respect to each of these categories. I find that although it is rare in western Canada for the courts to disqualify a witness who has been tendered as an "expert," there are many instances in which the court will accept a witness' qualifications subject to the understanding that opposing counsel will exercise its right to subject the witness to vigorous cross-examination. And in many others, the court will caution that an expert's testimony is to be given reduced weight.

1. Useful

The first requirement that must be met before an expert can be permitted to testify – often referred to as the "gatekeeper" component - is that the expert's testimony must be shown to be "necessary in assisting the trier of fact." (*R. Mohan*, [1994] 2 S.C.R. 9). This requirement has a number of implications.

First, the expert's testimony must not have the effect of usurping the court's function, of weighing evidence, evaluating the credibility of witnesses, making findings of fact, reaching conclusions concerning legal matters, etc. In *Snelgrove*, (2015 ONSC 585, at para 12), for example, the court disqualified a witness, in part because he "…purports to come to legal conclusions," specifically concerning the defendant's intent, negligence, misrepresentations, and misconduct.

Second, the expert's report must offer an opinion concerning the issues in dispute. See, for example, *Hoang v Vicentini* (2012 ONSC 1358) in which an accident reconstruction expert's report was dismissed on this ground.

Third, for expert evidence to be admissible:

> [t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge. (*Kelliher (Village of) v. Smith*, [1931] S.C.R. 67 quoting from *Bevan on Negligence*)

Or, as Lawton, LJ concluded in *R. v. Turner* ([1975] Q.B. 834, at 841):

> An expert's opinion is admissible to furnish the court with scientific information that 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 an expert is unnecessary.

In Canada, there has been little debate about the definition of the term "scientific information" as used in *Turner*. In the United States, however, two decisions of the Supreme Court – *Daubert v. Merrell Dow Pharmaceuticals, Inc ((1992) 509 U.S. 579)* and *Kumho Tire Co. v. Carmichael* ((1999) 131) - have ruled on the interpretation of the terms "scientific, technical, or other specialized knowledge" contained in Rule 702 of the U.S. Federal Rules of Evidence. Of particular importance to Canadian practitioners is that the Supreme Court of Canada, in *R. v. J.-L. J. ([2000] 2 S.C.R. 600, 2000 SCC 51)* explicitly approved of the four criteria set out in *Daubert* for determining whether expert testimony met the requirement that it constitute "scientific knowledge." These are:

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) In the case of a particular technique, what "the known or potential rate of error" is or has been.
4) Whether the evidence has gained widespread acceptance within the scientific community.

The *Daubert* criteria proved less applicable to issues involving "technical" than "scientific" knowledge, such as that often proffered by engineers, however. Accordingly, the United States Supreme Court agreed to hear *Kumho Tire*. In that case, an expert in tire failure analysis relied in part on his own (extensive) experience to determine whether a failure in a tire was caused by a defect and not by misuse on the part of the plaintiff. As the expert's testimony did not meet any of the criteria set out in *Daubert*, the issue in *Kumho* was whether "technical and other specialized knowledge," as defined in Rule 702, was to be subjected to the same criteria as was "scientific knowledge." The Court ruled that it was not. Testimony about a technical matter could be considered to be "expert" if it:

> …focuses upon specialized observations, the specialized translations of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case.

The function of Rule 702 was not to restrict expert testimony to a narrow set of "scientific" disciplines, but to:

> … make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

It was the application of "intellectual rigor" that distinguished an expert from a layman, as much as did the possession of specialised, formal training.

2. Qualified

As the expert's role is to provide information that is not within the "experience and knowledge of a judge or jury," it is necessary to show that those individuals who are presented as "experts" possess the requisite training and experience. With respect to scientific knowledge, this has generally meant that the witness must have obtained a graduate degree, such as an M.Sc. or Ph.D., or a professional designation, such as a law or accounting degree. With respect to technical skills, an individual (such as the tire expert in *Kumho*) may develop "expertise" through long personal experience with the matter before the court. In both cases, however, the witness is expected to

apply intellectual rigour to the interpretation of the evidence before the court.

Furthermore, the expert's testimony may not be admitted if his or her qualifications are inferior to those of other witnesses who have been tendered as experts in the same action. It was for this reason that, in *Levshtein v Ramirez* (2013 ONSC 521), a chiropractor's opinion concerning the plaintiff's ability to perform household tasks was not admitted. Although the chiropractor had performed a number of tests of the plaintiff's hand strength and weight-lifting ability, the court found that other witnesses were more qualified to testify concerning the extent to which the plaintiff's physical disabilities had affected his activities in the home.

In a recent survey of more than 12,000 American decisions, PWC (formerly Price Waterhouse Cooper) found that the courts had focussed on two factors: relevant *academic credentials* and relevant *experience*, when evaluating qualifications. The courts generally ruled that extensive experience *might* be sufficient to outweigh lack of credentials (for example, working as an bookkeeper in a role relevant to the case, such as franchising); and appropriate credentials might not be enough if the area of specialization was not relevant (for example, an expert testifying on loss of earnings might have a PhD in economics, but in international trade). (PWC, *Challenges to Financial Experts: 2000-2016*, (pwc.com).)

3. Reliable

Two broad issues are canvassed when determining whether the testimony of the expert is of sufficient reliability to be of value to the court. First, the evidence presented by the expert must be "relevant;" that is, it must be "… so related to a fact in issue that it tends to establish it." (*Mohan*, at 20) Second, the expert must provide an "objective and unbiased" opinion.

Relevant

To be relevant, expert evidence must meet two criteria. First, any factual evidence must meet standard tests of statistical reliability. Data must be collected in a manner that ensures that it is representative of the group to which it is to be applied. For example, if a doctor's opinion is based on observation of his or her own patients, precautions must be in place to ensure that those patients are similar to the plaintiff in question. Similarly, if evidence is drawn from reports published by third parties, the expert must be careful to ensure that the definitions used in those studies refer to the same concepts that are of importance to the case at hand. [For further elaboration on these points, see Christopher Bruce, "The Reliability of Statistical Evidence Concerning the Impact of Disability" *The Expert Witness*, 2004 (3).]

Second, there must be a compelling logical and/or statistical correlation between the evidence that has been presented and the conclusion that the expert purports to draw. This is particularly problematic when the expert misunderstands or misrepresents statistical studies that have been published by third parties.

Objective and unbiased

If an expert has a financial, personal, or professional interest in the outcome of a case, which may induce that expert to bias his or her opinion, the court may either disqualify the expert or place reduced weight on that opinion. [The following discussion is informed largely by the decisions in *United City Properties v. Tong*, 2010 BCSC 111 and *R. v Klassen*, 2003 MBQB 253; and by Paul Michell and Renu Mandhare, "The Uncertain Duty of the Expert Witness," Alta L Rev 42.3 (2005).]

Financial: A number of factors have been identified by the courts that may have led the expert to have a financial interest in the out-

come of the case. These include:

- A contingency fee,
- A long association, or exclusive association, with one lawyer or party,
- Employment by either the plaintiff or defendant.

Personal: The witness's objectivity may also be questioned if he or she had:

- A personal interest in the outcome, either because that outcome would directly affect the witness or because it would set a precedent that would affect him or her,
- A personal relationship, such as friendship or a family connection, to one of the litigants.

Professional: If the witness has taken a strong stance on a contentious issue facing the courts – such as the manner in which the discount rate is to be determined - that witness may come to consider his or her professional reputation to be dependant on acceptance of that view by the court. This may lead the expert to discount or ignore evidence contrary to his or her professed view.

Even in the absence of evidence that an expert has an interest in the outcome of the case, the court may still find bias, based on the content of the expert's statements, report, or testimony. Evidence of such bias has been found when:

- The witness has been found to have made statements publicly that show philosophical hostility towards certain subjects,
- The expert's report has been withdrawn or modified without reasonable explanation,
- The expert's opinion has been found to differ, for unexplained reasons, between occasions on which the expert appeared for the defence and those when he/she appeared for the plaintiff,
- The expert has departed from any governing ethical guidelines established in the expert's field of expertise,
- The expert has persistently failed to recognize other explanations or to provide a reasonable range of opinion,
- The witness has operated beyond his or her field of stated expertise, such as when an economist comments on the appropriate costs of caring for an injured plaintiff,
- The expert has failed to substantiate his or her opinions,
- The expert has acted as an "…informed champion or enthusiastic supporter of the retaining party's cause." (Michell and Mandhare at 648, quoting *Halpern v. Canada* (A.G.) (2002), 215 D.L.R. (4th) 223 at paras. 143-44 (Ont. Div. Ct.).)

Nevertheless, in *Moore v Smith Construction* (2013 ONSC 5260), a scientist who worked for an advocacy group that provided legal services to the respondent was allowed to testify as an expert. The court found, following a *voir dire,* that there was no evidence of bias or partiality. Instead of disqualifying the scientist, the court ruled that the "… fact that the proposed expert is employed by the party can be taken into account when the trial judge assesses the weight and value of the evidence". (at para 47)

4. Weight

If the court has found a degree of bias in the expert's testimony, it can choose among: disqualifying the expert, announcing that it will allow the expert's testimony but give lesser weight to that evidence, or leaving criticism of the expert's report to cross-examination by opposing counsel.

Of these, the first would seem to be of primary importance in cases that were tried before a jury, and the second and third to cases that were heard before a judge. As a judge will, presumably, be less influenced by biased and unqualified witnesses than would be a jury, it may be less harmful to permit questionable testimony when the case was being tried by judge alone than when it was being heard before a jury. On these grounds, we would expect experts to be disqualified more often in Canadian courts in criminal cases than in tort cases; and more often in tort cases in the United States than in equivalent cases in Canada.

In *Gutbir v University Health Network* (2010 ONSC 6394), a medical malpractice case, the court allowed the treating physician to testify to fact; but, on the ground that he had a personal interest in the outcome of the case, it denied him qualification as an expert.

Contrary to our speculation above, however, the PWC survey found that American courts are reluctant to exclude expert testimony. Rather they apply a "light hand on the gate", preferring to subject the expert's opinion to vigorous cross-examination, especially if the disagreement concerns the choice of an appropriate or inclusive set of data. They were also found to be willing to allow experts to revise their reports in light of objections from opposing counsel.

Summary

The courts admit the testimony of expert witnesses only with a good deal of apprehension. First, they are reluctant to cede their role of weighing evidence, evaluating the credibility of witnesses, making findings of fact, reaching conclusions concerning legal matters, etc. And, second, they have qualms about the qualifications and independence of witnesses who have been tendered as "experts".

As a result, the courts have developed lengthy lists of requirements that witnesses must meet before they can be accepted. The purpose of this article has been to review these requirements and to ask how they have been applied in practice. The most important finding of this review has been that the requirements have become sufficiently well known that it is uncommon for legal counsel to put forward individuals who fail to meet the court's assessment. Rare cases remain in which experts are disqualified; but, more commonly, where an expert has been challenged, the court has allowed the expert: to re-write his or her report, to submit the report subject to the condition that it will be given reduced weight, or to testify subject to the understanding that opposing counsel has the right to cross-examine "vigorously".

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