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HEALTH CARE PROFESSIONALS AS EXPERT WITNESS:
EXPERT REPORTS AND COURTROOM TESTIMONY

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HEALTH CARE PROFESSIONALS AS EXPERT WITNESS: Expert Reports and Courtroom Testimony

I. INTRODUCTION:

There are two types of witnesses who usually testify at most trials, non-expert or lay witnesses and expert witnesses. In fact, a personal injury claim or trial will almost always include evidence from both types of witnesses.

II. THE NON-EXPERT OR LAY WITNESS:

A non-expert or lay witness may testify in the form of an opinion if it qualifies as follows:

1. An inference or conclusion drawn by a witness who personally observed the facts from which the inference is drawn; and
2. The inference or opinion is one which the ordinary lay witness is capable of drawing, based upon a matter of common knowledge and experience.

Permission to express an opinion in this form rests ultimately in the trial Judge's discretion.

Some of the recognized instances of lay witnesses testifying include the following:

1. Identification of documents, persons or objects;
2. Estimates of a person's age;
3. Assessment of a person's physical condition, state of health, observations of impairment, illness or death;
4. Assessment of a person's emotional state or mental health including distress, anger, aggression, affection, depression or other mental illness;
5. The physical condition of things, including, worn, shabby, new or used;
6. Estimates of the market of value of real or personal property; or
7. Estimates of speed, time, and distance.

Generally speaking, non-expert or lay witnesses should try to testify about what they observed in as much detail as possible and refrain from drawing conclusion or reasoning from their observation.

III. EXPERT WITNESS:

An expert witness is a person qualified by special skill, knowledge, training or experience. The inference or conclusion drawn by the witness must be within the area of the witness' expertise and the judge or jury must need the assistance of the expert to draw the correct inference. These requirements are matters for the trial judge to determine.

The Supreme Court of Canada in R v. Mohan, a criminal decision in 1994, restated the criteria for determining the admissibility of expert opinion evidence.

To qualify for admissibility, the court said expert evidence must meet four criteria:

1. Relevance;
2. Necessity in assisting the trier of fact (the Judge or Jury);
3. There must not be any exclusionary rule; and
4. Given by a properly qualified expert.

1. Relevance:

Ordinarily, evidence satisfies the criterion of relevance if there is a minimal logical connection between the evidence and the "fact in issue". Relevance is a matter for logic and human experience.

2. Necessity in Assisting the Trier of Fact:

Expert opinion is admissible only if it is necessary to assist the trier of fact. If the judge feels a jury can get by without expert opinion, it is unnecessary and inadmissible. If the issue is beyond ordinary human knowledge and experience, the judge or jury will require expertise to reach a correct result.

3. Absence of Any Exclusionary Rule:

Even if the evidence is determined to be expert evidence, it still may not be admissible because of another exclusionary rule.

For instance, expert evidence may not be admissible if it is tendered into court by way of a leading question.

The character evidence rule generally prohibits lay or expert witnesses from testifying in the form of opinion about the character of a party or a witness for truthfulness. For instance, in a personal injury case, expert evidence is usually inadmissible if it is merely the personal opinion of the expert as to the honesty or dishonesty of the Plaintiff in advancing the claim for damages. On the other hand, expert testimony may properly be offered that can come close to an opinion on the character of a party or witness. For example, a medical report may offer an opinion that the Plaintiff's symptoms were not caused by the Defendant but by a form of psychological dysfunction.

An expert would offend the character evidence rule by imputing dishonesty to the Plaintiff such as describing the Plaintiff as a "malingerer" or a "liar".

4. A Properly Qualified Expert:

The Supreme Court of Canada in Mohan, said that the fourth criteria for the admissibility of expert evidence is a requirement that the expert be properly qualified. The lawyer offering an expert must show that the witness has special or particular skill through training, study or experience. The qualifications of expert witnesses may affect the admissibility and the weight given to their evidence by the Judge.

IV. WHAT IS AN EXPERT?

A) EXPERT AS ADVISOR:

Often experts must, by necessity, advise counsel on technical matters to enable counsel to formulate their case. As an advisor, the expert witness can play an integral role in investigating facts, theorizing about causal relationships, delineating issues and relating to the factual analysis to the legal theory.

To properly assist counsel, an expert advisor must be able and free to engage in the full and free ranging enquiry into all issues. The advisor must have the freedom to test, reject, and readapt theories and propositions. Such constant reexamination of the issues may actually increase the credibility of an expert.

As an advisor, the expert is a partisan in the adversarial process in much the way that counsel is.

This role for the expert is quite distinct from the role of expert as a witness whose first virtue is objectivity and impartiality.

B) EXPERT AS A WITNESS:

The distinction between an expert advisor and an expert witness has been clearly articulated by Mr. Justice Finch in **Vancouver Community College v. Philip Barrett** (1997), 20 B.C.L.R. (2d) 289 at 296-298 (S.C.):

So long as the expert remains in the role of confidential advisor, there are sound reasons for maintaining privileged (confidentiality) over documents in his possession. Once he becomes a witness, however, his role is substantially changed. His opinions and their foundations are no longer privatized for the party who retained him. He offers his professional opinion for the assistance of the court in its' search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scientific, technical or complicated matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified. It is as though the party calling him says, "here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won't get anywhere. The witness has nothing to hide."

The expert can be of no assistance to either the court or counsel where he or she strays from the role of an objective and independent witness and puts on the mantle of an advocate.

C) THE EXPERT IN DUAL ROLES:

Privileged (Confidentiality) and the Testimonial Expert

When an expert witness is called to testify or when his report is placed in evidence, he may be required to produce to counsel cross-examining him, all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judge in the circumstances of each case. If those requirements are met, the documents must be produced because there is an implied intention in the party presenting the witness' evidence, written or oral, to waive the "lawyer's brief" privilege which previously protected the document from disclosure: **Vancouver Community College v. Philips Barrett**.

The expert called to testify or whose report is filed at trial is required to produce all documents which are or have been in his possession, including draft reports (even if they come from the file of the solicitor with annotations), and any other communications which are or may be relevant to the matter.

In practice, when an expert witness acts as both an advisor and a witness, it is essential that counsel conduct enquiries and discussions with the expert in such a way that disclosure of confidential information is minimized.

V. LIMITS UPON EXPERT TESTIMONY:

- A. An expert may not express conclusions of Law
- B. An expert may not interpret contracts
- C. An expert may not make finding of fact
- D. An expert may not opine on issues outside his or her area of expertise
- E. An expert may not offer argument disguised as opinion
- F. An expert may not advance unreliable novel scientific theories
- G. An expert cannot opine on issue of common knowledge
- H. An expert report should not be overly general

VI. THE ESSENCE OF EXPERTISE IS SKILL:

The expert must assist the judge, where due to the complexities of the issue, reaching the correct conclusions is difficult or impossible. Whether a person is an expert is a question to be determined by the judge. The essence of expertise is skill.

"[S]o long as the expert satisfies the court that he is skilled, the way in which he acquired his skill is immaterial. The test of expertness, so far as the law of evidence is concerned, is skill and skill alone, in the field in which it is sought to have the witness' opinion. If the court is satisfied that the witness is sufficiently skilled in this respect for his opinion to be received, then his opinion is admissible.

...

I adopt, as a working definition of the term "skilled person", one who has, by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought, and the practical opinion to use his judgment in that science". Mr. Justice Tyrwhitt-Drake (R v. Bunniss) (1964) 50 WWR 422 at 424 (B.C.C.O.C.T.).

Clearly an individual can be an expert without formal training. An expert with formal training who lacks practical experience may very well have his opinion given less weight than the expert with practical experience.

VII. CHOOSING AN EXPERT:

1. The Expert's Qualifications

- A. Academic Credentials
- B. Correlating the Opinion with the Qualifications
- C. Retaining a Firm Rather Than an Individual

2. Reputation

- A. Reputation in the Courts
- B. Reputation in the Expert's Profession
- C. Verifying the Expert's Reputation

3. Presentation

- A. Written Presentation
- B. Demeanor in Court

4. Finding the Expert

- A. Ask the Client
- B. Experts for Insurers
- C. Survey Technical Literature
- D. Search Previous Cases
- E. Private Search Firms
- F. Search the Internet
- G. Other Lawyers

VIII. THE LAWYER WORKING WITH THE EXPERT:

1. The lawyer needs to continually evaluate his case to ensure that this is the right expert for the case. (for example, is expert still within his/her expertise).
2. The lawyer and expert need to ensure that each understands what is expected of the other.
3. The expert needs to clearly understand the issues in this case.
4. The expert needs to understand confidentiality and dealing with "persons adverse in interest."
5. The experts need to understand the issue of privilege (confidentiality) (i.e. debate regarding presentations of working papers or drafts of the expert).
6. The expert needs to understand the basic principals governing admissibility of his/her report.
7. The expert should be succinct, clear and understandable.
8. Examples of improper opinion treading on judicial toes:
 - opinions on credibility of witnesses
 - opinions that make findings of fact
9. Examples of improper opinion treading on counsel's toes:
 - arguments in the guise of expert opinion evidence
 - opinions that reveal partisanship
10. Experts are Immunity from Civil Liability

11. Hospital Records

hospital records containing a fact and medical opinion is admissible to prove a fact, such as the date on which a medical condition occurred, but its admissibility to prove the medical opinion as an opinion is in doubt in BC

hospital records, including nurses' notes made contemporaneously by someone having personal knowledge of the matters being recorded and under a duty to make the entry or records should be received in evidence as prima facie proof of the facts stated: Ares v. Venner (1970)(SCC)

IX. PREPARING THE EXPERT FOR APPEARANCE AT TRIAL:

A) QUALIFICATION AND EXPERIENCE:

To be accepted as an expert, the witness must present his or her credentials and be accepted by the court. In preparing the expert's introduction, the lawyer should consider how the judge will understand and be affected by the expert's credentials. The expert's specialized knowledge should be emphasized. The expert must exercise great caution in preparing his or her curriculum vitae. It is essential that the expert never overstate his or her qualification. If this occurs, it will undermine the credibility of the expert.

Where the expert has written articles that may be relevant, the expert should have copies of these available.

After the counsel who is presenting the expert to the court has thoroughly presented the qualifications of the expert to the court, there is an opportunity for opposing counsel to cross-examine the expert on his expertise. This cross-examination may very well include details of an expert's curriculum vitae. Opposing counsel will try to show the expert's qualifications are limited and not necessarily applicable to this present case.

If the expert has written articles that are at odds with his or her present opinions, this may very well provide fodder for cross-examination.

B) PREPARING THE EXPERT FOR DIRECT EXAMINATION:

To properly prepare the expert witness for trial, it is important that counsel both understand and be comfortable with the opinion to be expressed, before the expert gives evidence. Counsel should be educated on the evidence before guiding the expert on how the evidence should be presented or explained at trial.

In preparing the witness to give evidence, counsel should review the report in detail with the expert and have him or her explain every aspect of it. This review should be not only a test of the expert's ability to give evidence but also part of the education process for counsel to fully understand the opinions to be given.

This preparation process can and often does include a mock cross-examination of the expert witness to test him or her on those portions of the evidence which are likely to be challenged to opposing counsel. A full, "dress rehearsal" of cross-examination can be useful in identifying weaknesses in the evidence and building up the confidence of the expert for the real thing.

The expert and counsel should ensure that the correct factual assumptions have been made and that counsel can prove these at trial.

This briefing process prior to direct examination should offer the expert witness some general guidance on the nature of the evidence to be given. In particular:

1. Counsel should explain to the expert the issues in dispute in the action which are relevant to the expert's evidence, so the expert will know where his or her evidence fits into the overall picture. This will assist the witness not only in giving direct evidence but also in placing into context any questions asked on cross-examination;
2. The witness should be fully briefed on the general rules of giving evidence at trial; that is, to listen carefully to the question asked, to answer only the questions posed, to give explanatory evidence only where necessary, not to be argumentative and so. By canvassing these subject with counsel, the expert witness will hopefully gain confidence;
3. The expert witness should understand the scope of his or her expertise and that his or her testimony cannot exceed those limits;
4. The expert should be encouraged to use plain language wherever possible. Where technical terms must be used, the witness should be encourage to give a non-technical explanation of terms whenever appropriate;
5. The witness should also be encouraged to give evidence at a pace which enables the judge or jury to clear understand the evidence. This may in some instances include the expert witness using models or diagrams to assist in giving evidence;
6. It is essential that the expert witness understand that the evidence is for the benefit of the court; and
7. The expert should speak to the judge (or jury if there is a jury) rather than to the counsel examining or cross-examining them.

C) PREPARING THE EXPERT FOR CROSS EXAMINATION:

Counsel should explain to the expert witness the general nature of cross-examination. This expert should be familiar with all of the parties and the theories of the case. The objective is to ensure that the expert has no gaps in knowledge and that the expert does not have to admit that he or she knows nothing about an important aspect of the case. The briefing should enable the expert to place in context the questions asked in cross-examination and tailor the answers accordingly.

Counsel should also give the expert an indication of the questions that might be asked in cross-examination. Perhaps even a mock cross-examination with feedback afterwards may appropriate.

A mock cross-examination frequently helps to build the expert's confidence as well identifying any weaknesses in the expert's evidence.

In cross-examination, the expert should be able to explain why any contradictory theories, text or texts may not be relevant.

When it comes time for the lawyer to cross-examine the opposing expert, his or her expert will usually be an excellent source of information that can be used to challenge the opposing expert under cross-examination.

Finally, the expert witness should understand that his or her entire file might be produced at trial for cross-examination. Experts should be advised to exercise caution when writing random or incomplete thoughts on their file which have not had the benefit of full analysis or consideration.

X. CALLING EXPERT EVIDENCE:

The standard procedure for presenting expert evidence at trial is to introduce a written report of the expert. There are specific statutory requirements relating to this. These are set in the appendix.

With three exceptions, lawyers will not call a witness to give verbal evidence.

A lawyer may call an expert witness at trial where:

The opposing lawyers insists on cross-examining the expert;

The expert needs to explain certain aspects of the written report to the judge or jury; or

A full report from the expert has not been filed in which case the lawyer may require the expert to give oral evidence.

XI. CONCLUDING THOUGHTS:

Preparing reports and giving evidence in Court is something that most people in the medical or rehabilitation field will have to do sometime in their career. No one is born to be an expert witness. Some of the best experts witnesses have honed their skill over many years and many cases.

An understanding of the process is an essential first step. Do not hesitate to ask the lawyer as many questions as necessary. Be prepared and know the case! Relax and enjoy-it becomes easier with time.

APPENDIX A

Chapter 9 - The Expert Witness in Court: A Trial Judge's Observations — By Mr. Justice Lowry

APPENDIX B

Evidence Act, R.S.B.C. 1996, c. 124, ss. 2 and 10 to 12

APPENDIX C

Court Rules Act, R.S.B.C. 1996, c. 80

- *Supreme Court Rules*, B.C. Reg 261/90
 - Rule 32A – Court Appointed Experts
 - Rule 40A – Evidence of Experts
- *Small Claims Rules*, B.C. Reg 261/93
 - Rule 10(3) to (8) – The Trial

APPENDIX D

Law Society of British Columbia, Professional Handbook – chapter 8, ss. 12 to 17

APPENDIX E

Sample Precedent Retainer Letter

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“Our goal is to ensure that our clients receive the best rehabilitation available as quickly as possible while actively working to protect our client’s legal rights to obtain the best possible lifetime compensation.”

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