

## The Role of Experts at Trial from the Plaintiff's Perspective<sup>1</sup>

The principle that experts may provide valuable assistance to the judge or jury trying a particular case is beyond reproach. The utility of experts in all circumstances, the degree to which experts overstep the role of the court as decision maker, the degree to which experts have come to be seen as increasingly necessary in cases, and the blurring of the line between “expert” and “advocate” in some cases, should be cause for concern.

Here, we briefly consider some of these issues and provide background on the admissible use of expert evidence at trial, and the manner in which expert opinion of questionable value has been addressed by the courts in British Columbia.

The use of expert opinion to assist the court dates back as early as 1554, in the English decision of *Buckley v. Rice-Thomas*, where the Court of King's Bench stated:

And first, I grant, that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is the honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worth of commendation.<sup>2</sup>

Several hundred years later, the decision of Lord Mansfield in *Folkes v. Chadd*<sup>3</sup> would come to be seen as the seminal case on the necessary criterion for the acceptance of expert evidence at trial. Lord Mansfield's ruling encouraged the admission of the testimony of experts in “matters of science”. The case stood for the basic propositions regarding experts routinely cited by our courts to this day: 1) experts must have firsthand knowledge of the facts on which they opine; 2) experts should be confined to giving opinions in their fields of expertise and; 3) experts must have acquired some “expertise” through specialized training and experience in order to provide opinion evidence.<sup>4</sup>

In Canada, these propositions were adopted by the Supreme Court of Canada in the criminal context in *R v. Preeper*.<sup>5</sup> There, the Crown called evidence from a doctor who performed the post-mortem examination of a deceased. The doctor was asked to provide an opinion on the likely distance from which the victim was shot. An objection was raised regarding his testimony that the shot came from close range, the argument being that this went beyond a doctor's area of expertise. The opinion was allowed.

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<sup>1</sup> Portions of this paper are reproduced from James U. Buckley and Kelley C. Stewart, “Expert Opinion in an Adversarial System”, *The Verdict* 140 (Spring 2014) 57.

<sup>2</sup> (1554), 1 Plowd. 118, 75 E.R. 182 at 192.

<sup>3</sup> (1782), 3 Doug. 157, 99 E.R. 589 (K.B.).

<sup>4</sup> For a more detailed consideration of the early history of expert advocacy and this Canadian decision, see Glenn R. Anderson, *Expert Evidence*, 2d ed. (Markham, Ont.: LexisNexis, 2009) at 1-20.

<sup>5</sup> [1888] 15 S.C.R. 401, S.C.J. No. 22.

On appeal to the Supreme Court of Canada, the majority were of the view that the evidence was properly before the jury because the doctor had “exceptional advantages and knowledge which the jury could not have had”<sup>6</sup> and, therefore, the opinion was in a sense the best evidence available on the topic.

Justice Strong dissented. He found the expert evidence lacking because the medical doctor had no personal experience with firearms and the knowledge he did have in that area was obtained only from his professional studies. In expressing his dissent, Strong J. articulated the law on the admissibility of expert evidence is limited to fields of knowledge in which the ordinary juror was unlikely to have experience:

There can be no doubt as to the rule established in practice and by incontrovertible authority, that no evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts.<sup>7</sup>

In *R. v. Abbey*, the Supreme Court of Canada reviewed this issue and established some modern principles by which admissibility of expert evidence is to be measured in both civil and criminal contexts.<sup>8</sup> The Court stated that to be admissible, an expert opinion must be *necessary to the trier of fact* and must be within the expertise of the opinion maker.<sup>9</sup> This test is now considered and referred to as invoking a “gatekeeper” function for the court to prevent the use of impermissible opinion evidence dressed up as expert evidence where the expert really lacks necessary qualifications, or where the opinion is not truly necessary to assist the court. The concept of necessity was considered in cases but no clear standard for necessity emerged.

In *R. v. Mohan*, the Supreme Court of Canada again revisited this issue in a meaningful way when it upheld the decision of the trial judge to exclude the evidence of a doctor at trial who was professed to be an expert “psycho-sexual” profiler.<sup>10</sup> The trial judge had doubts about the utility of the opinion for the jury and about the scientific foundation for the alleged expertise. The trial judge refused to admit the opinion evidence.

Justice Sopinka writing for the Supreme Court urged the exercise of caution in allowing expert opinion to be admitted at trial and set out the well-known test for the admissibility of expert evidence:

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;
- (d) a properly qualified expert.<sup>11</sup>

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<sup>6</sup> *Ibid.* at 420.

<sup>7</sup> *Ibid.* at 409-10.

<sup>8</sup> [1982] 2 S.C.R. 24.

<sup>9</sup> *Ibid.* at 42.

<sup>10</sup> [1994] 2 S.C.R. 9, S.C.J. No. 36.

<sup>11</sup> *Ibid.* at para. 17 (Q.L.).

In the personal injury context the use of experts has grown out of the evidentiary concern that the plaintiff is required to prove causation of each injury alleged or risk those portions of the claims being denied. Increased specialization in medicine also plays a role. The result is more experts, more expense and more court time required for trials. This has not gone without notice by the courts.

In 2002, Newbury J.A., in her concurring decision in *MacPherson v. Czaban*, an appeal of an application to strike the jury in a case that involved multiple injuries and experts, commented on the trend towards more experts and the increased complexity of litigation:

...I wonder whether on the whole, the expansion of discovery, the use of multiple experts, the length of cross-examination, the level of detail and the number of issues that now characterize the trial process have really improved the fairness of our hearings or of our justice system generally. The expense and length of litigation are being constantly decried by lawyers and by the public. Chief Justice McLachlin has challenged the profession and the judiciary to find ways of restoring the accessibility of the system. In addition to these concerns there is of course also the fact that a party to litigation has a prima facie right, in the circumstances of this case at least, to have it heard by a jury which is able to bring common sense and a more up-to-date perspective to bear.

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Ultimately, however, the problems of the expense and length of trials and accessibility of justice will, in my respectful opinion, likely require structural change—perhaps a set of Rules like those we have now, which would apply to very complex litigation, and another set of Rules which clearly limit the length of discovery, the number of experts and even the length of trial for all other litigation. Unless something like this happens—and fortunately, it is not up to me to figure out what to do—I suspect the right to have a jury of one's peers on a civil trial will, as Mr. Farquhar suggested, become a thing of the past... Even more importantly, the use of the trial process itself will become a luxury available only to the government and the very rich. In the long run, that is not, in my view, the road to justice or fairness.<sup>12</sup>

In the personal injury context, little has changed since 2002 and the increasing specialization within medicine has not helped this cause. Injuries that might have been the subject of the opinion of one doctor previously, now may involve two or three experts by the time the matter arrives at trial. If both parties have the same number of experts, a case that could perhaps be heard in four or five days might now require ten or twelve. As there often tends to be little agreement between experts, this requires lengthy and detailed cross-examination by counsel on both sides.

One of the main points of dispute in personal injury matters appears to often be over the real or perceived bias and/or improper “advocacy” on the part of the opposing expert. The law has sought to address this concern and it is clear in British Columbia that experts may not: make findings of fact, offer an opinion without a reliable scientific foundation, express conclusions of law, opine outside their area of expertise, offer opinion on areas of common knowledge, or advocate for a party.<sup>13</sup> Our courts

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<sup>12</sup> 2002 BCCA 518 at paras. 24, 26.

<sup>13</sup> See for example *R. v. Abbey*, *supra* note 8; *R. v. Mohan*, *supra* note 10; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Marquard*, [1993] 4 S.C.R. 223; *Cogar Estate v. Central Mountain Air Services Ltd.* (1992), 72 B.C.L.R. (2d) 292 (C.A.); *Vancouver Community College v. Phillips Barratt* (1988), 26 B.C.L.R. (2d) 296 (S.C.); *Emil Anderson Construction v.*

recognize that there is a significant difference between what is permissible—to advocate for one’s opinion—and what is impermissible—to advocate for the position of a party. In some cases, this is a fine line; in others, it is not.

The expert as advocate is perhaps the most polarizing assertion that arises in this area. When the civil Rules of Court in British Columbia were revised in 2010, one change in the Rules was to codify the duty of the expert to be impartial and not an “advocate” by requiring that experts certify this in the body of their reports.<sup>14</sup> This is a step in the direction of offering the court fair and unbiased opinions not designed to sway or persuade, but to explain the non-easily explainable or issues that require specialized knowledge.

There are a number of cases in British Columbia worthy of consideration when addressing advocacy on the part of the opposing expert. In *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, N. Smith J. referred to the *Emil Anderson* cases on admissibility of expert reports.<sup>15</sup> The reports were held to be inadmissible where they consisted of an assessment of the claim, the opinions could not be separated from the facts and assumptions on which they were based, and they were directed to the merits of the case and were more appropriate as argument than as evidence.

In *Surrey Credit Union v. Wilson*<sup>16</sup> and *Bolton v. Vancouver (City)*,<sup>17</sup> the court held that expert reports were inadmissible where they were essentially a reworking of argument of counsel and argument in the guise of opinion. The court differentiated between an expert impermissibly advocating for a party and the expert permissibly advocating for their position.

It is not the role of the expert to make findings of fact or to interpret the evidence. That is the sole prerogative of the court. The expert should provide assistance to the court in making findings on fact on issues of scientific or unusual complexity. Fundamentally, that means offering an opinion from first-hand knowledge, in the appropriate area of expertise on a topic that begs for knowledge which cannot be imputed to the court.

In *Brough v. Richmond*, McKinnon J. found the report of a psychiatrist was inadmissible where the expert lapsed into advocacy and presented argument in the guise of opinion.<sup>18</sup> The psychiatrist overstepped his role as expert by drawing conclusions from the materials and providing editorial commentary, and arguing the inadequacy of previous medical assessments. The expert commented critically on the assessments of other experts and argued that the conclusions of other experts were without a solid basis. McKinnon J. repeated that experts cannot “find facts” and must clearly state the facts and assumptions on which their opinion is based.

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*B.C. Railway Co.* (1987), 15 B.C.L.R. (2d) 28 (S.C.); *Emil Anderson Construction v. B.C. Railway Co.* (1987), 17 B.C.L.R. (2d) 357 (S.C.); *Hennessey v. Rothman* (1998), 26 B.C.L.R. (2d) 322 (S.C.); *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899; *Dhaliwal v. Bassi*, 2007 BCSC 547.

<sup>14</sup> *Supreme Court Civil Rules*, R. 11-2.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> (1990), 45 B.C.L.R. (2d) 310 (S.C.).

<sup>17</sup> 2002 BCSC 537.

<sup>18</sup> 2003 BCSC 512.

In *Dhaliwal v. Bassi*, Burnyeat J. held that the report of a psychiatrist was inadmissible where the expert had not interviewed the plaintiff and prepared a report on a records review.<sup>19</sup> Plaintiff's counsel submitted that the report was really a report prepared "to assist counsel in his evaluation of the case and areas for cross-examination of the Plaintiff's witnesses".<sup>20</sup> The court held that it was not assisted by the "opinion" of a psychiatrist who had not seen the plaintiff and who based their opinion mostly on documents that would likely not be in evidence at trial.

Experts owe a duty of impartiality to the court. Taking another page from the English courts, the statement of Campbell C.J.C., that it was indispensable to the administration of justice "that a witness should not be turned into an advocate, any more than an advocate should be turned into a witness",<sup>21</sup> still applies today. In British Columbia this is now codified in our Rules of Court.<sup>22</sup> There are some cautionary tales from our jurisprudence regarding the use of experts to advocate for a party rather than offering true opinion evidence to assist the court.

In the early 1990s, Dr. Murray Allen was retained often by ICBC-insured defendants. Frequently Dr. Allen had not examined the plaintiff, and would comment on the plaintiff's credibility. He relied on a study that he had conducted, financed by ICBC, and he routinely referred to and relied on engineering calculations regarding forces involved in collisions. His reports were invariably favourable to the defendant's case. Through the early 1990s, the courts in British Columbia regularly gave Dr. Allen's opinion little weight, in at least one case finding him to be an "extremely partisan witness".<sup>23</sup>

In *Parish v. Scott*<sup>24</sup> and *Rai v. Wilson*,<sup>25</sup> the courts focused directly on these flaws in Dr. Allen's reports and found his opinion inadmissible. Justice Harvey, in *Hughes v. Haberlin*,<sup>26</sup> hearing that the defendant intended to rely on the opinion of Dr. Allen, drew counsel's attention to the *Parish* and *Rai* decisions and sought submissions on the admissibility of the opinion. The report was held inadmissible and Harvey J. commented negatively on the defendant's decision to tender the opinion in the face of the earlier judicial commentary about this "expert". Dr. Allen rarely testified thereafter.

Justice Cole, in *Chiacig v. Chiacig*, pointed out other considerations that may apply to whether an expert is an "advocate" when he considered that the fees Dr. J. Fenton billed ICBC over a number of years suggested an economic motive that tainted the doctor's evidence.<sup>27</sup> Combined with his "argumentative and condescending"<sup>28</sup> attitude in the courtroom, this was sufficient to render his report of no utility and

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<sup>19</sup> 2007 BCSC 549.

<sup>20</sup> *Ibid.*, at para. 1.

<sup>21</sup> As cited in Glenn R. Anderson, *Expert Evidence*, 2d ed. (Markham, Ont.: LexisNexis, 2009) at 378.

<sup>22</sup> *Supra* note 14.

<sup>23</sup> *La Flamme v. Stevens*, [1991] B.C.J. No 586 (S.C.). See also *Sadowski v. Stevens*, [1992] B.C.J. No. 2790 (S.C.); *Lee v. Gill*, [1995] B.C.J. No. 830 (S.C.); *Palmer v. Hiebert*, [1992] B.C.J. No. 1011 (S.C.); *Grant v. Diels*, [1996] B.C.J. No. 1765 (S.C.); *Ram v. Harwood* (10 October 1996), Vancouver 95-14923 (Prov. Ct.).

<sup>24</sup> [1996] B.C.J. No. 2839 (S.C.).

<sup>25</sup> [1997] B.C.J. No. 2984 (S.C.) (*aff'd* 1999 BCCA 167).

<sup>26</sup> [1997] B.C.J. No. 2872 (S.C.).

<sup>27</sup> 2001 BCSC 1709.

<sup>28</sup> *Ibid.*, at para. 14.

the court described him as an advocate. Dr. Fenton fell out of favour with defendants after decades of testimony in our courts.

In *Schnare v. Roberts*, the court made similar findings regarding Dr. McPherson, commenting that the doctor's "close and lengthy association with ICBC reflected negatively on his impartiality".<sup>29</sup> The court found the doctor was not impartial, lacked objectivity and dismissed his opinion as unhelpful.

Where a party chooses to proffer opinion evidence from an expert who was previously the subject of negative commentary from the courts, there may be serious costs consequences. In *Jayetileke v. Blake*,<sup>30</sup> Dley J. considered the opinion of Dr. H. Davis, a psychiatrist whose opinion was previously rejected by the court due to advocacy and lack of objectivity.<sup>31</sup> The court noted that the defendant tendered Dr. Davis as an expert "in spite of the concerns that the Courts have expressed"<sup>32</sup> about him.

Justice Dley found the evidence of Dr. Davis to be unreliable, argumentative, and unresponsive. He found that Dr. Davis was an advocate and gave his opinion no weight. Justice Dley then sanctioned the use of Dr. Davis by the defendant with an award of special costs to the plaintiff:

For a trial to be fair, the Court must allow each party to put its best case forward. Where a party seeks to advance its position with reckless abandon seeking only the ultimate goal of victory and using questionable evidence along the way, that party risks sanctions in the form of costs penalties....

In this case and against the backdrop of previous judicial comment, the defence tendered Dr. Davis. He was nothing more than an advocate thinly disguised in the cloak of an expert. That is conduct deserving of rebuke and from which the Court disassociates itself.

In preparation for trial a review of the case law to determine whether an expert has been criticised by the court in the past is important. Effective cross-examination can be sufficient to address counsel and the court's concerns in that regard.<sup>33</sup>

The use of experts in our courts is widespread and entrenched. The range of issues on which expert evidence is now routinely tendered is broad. This is necessary and reasonable in many cases but it also extends trial length, uses up court resources and causes delay. It is expensive to litigants and may dissuade some from seeking redress. Proper expert opinion ought to be tendered where necessary and helpful to the court and for a proper purpose. Counsel and the expert must abide by their duty to not present improper opinion evidence. Advocacy should be left to counsel and fact finding to the courts.

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<sup>29</sup> 2009 BCSC 397 at para. 41.

<sup>30</sup> 2010 BCSC 1478.

<sup>31</sup> See *Grewal v. Brar*, 2004 BCSC 1157; *Gosal v. Singh*, 2009 BCSC 1471; *Kelly v. Sanmugathas*, 2009 BCSC 958; *Smusz v. Wolfe Chevrolet*, 2010 BCSC 82.

<sup>32</sup> *Jayetileke v. Blake*, *supra* note 23, at para. 38.

<sup>33</sup> *Chabot v. Chaube*, 2014 BCSC 300.

## **Some Practical Guides to Cross Examination of Experts at Trial from the Plaintiff's Perspective**

Good cross examination starts with careful preparation. Start your preparation for cross examination by identifying your case theory and the major issues in the case. If they are not clear to you, run a focus group. Identify the position taken by the defense expert in relation to the major issues of the case. Always have a goal of what you hope to achieve in cross examination.

The main goal of cross-examination of the opposing expert witness must be to either undermine the expert's testimony, and thereby the defence theory of the case, or to enhance the plaintiff's theory of the case. If neither goal may be achieved, stay seated. There are three main avenues for achieving one of these goals. These are not mutually exclusive and it is possible to achieve all three in your cross-examination of an expert:

1. Impeach or subvert the expert's testimony by showing that the expert lacks real qualifications and/or is less qualified than the plaintiff's experts in the case;
2. Enhance the plaintiff's case by having the expert adopt the plaintiff's theories by use of authoritative literature or hypotheticals; and
3. Minimize the impact of the expert's testimony by proving it to be poorly arrived at due to lack of pertinent information, or by showing the expert to be the outlier in the context of all of the other evidence in the case.

Where you fail to impeach an expert's qualifications, adjust your strategy and push to make your case stronger through the defence expert. Failing both of these objectives, do your best to minimize the impact of the expert's testimony on the overall case, or show it to be anomalous or out of the general context.

### **1. Impeaching the Qualifications of an Expert Witness**

It is essential to ask, "Is the expert qualified to give opinion evidence being put forward?" and "Does the expert have the firsthand knowledge to give the opinion he or she is offering the court?" This question goes back to the days of Lord Mansfield. If the answer is "no", then fight to keep the report out at trial on the basis that the opinions put forward are outside of the knowledge and expertise derived from the expert's training, education and work experience. If this fundamental test is not met the report should not be admitted.

Examples of where close scrutiny of the expert's qualifications and the opinion proposed to be tendered include *McEachern v. Rennie*, where Ehrcke J. held that a registered nurse and care home supervisor did not have the qualifications to assess the long-term care needs of a plaintiff.<sup>34</sup> In *Fabretti v. Singh*, Savage J. held that a proposed "expert" was not properly qualified to offer opinion evidence on the basis only of his experience as a national sales director at the plaintiff's place of employment. Although he

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<sup>34</sup> 2009 BCSC 941.

was experienced and knowledgeable in the plaintiff's field of work, this did not constitute expertise on the subject matter of the proffered opinion regarding plaintiff's future earning capacity.<sup>35</sup>

That being said, often it is somewhat difficult to tell exactly what the expert's qualifications are to offer certain opinions. Medical doctors in particular have vast training often in many different areas of medicine, although they may only practice in one area. It can be very useful to pay close attention to how opposing counsel seeks to have the witness qualified in appreciating the depth of the witness's knowledge and expertise. In addition cross examination on qualifications can assist in illustrating when an expert is drawing expertise from a shallow pool of direct knowledge.

In *Turpin v. Manufacturers Life Insurance Company*, R.D. Wilson J. found an expert report inadmissible, in part, on the basis that the expert's qualifications had not been explicitly made out.<sup>36</sup> In that case, the expert doctor was described as having completed a residency in internal medicine and as "doing internal medicine on the Clinical Teaching Unit".<sup>37</sup> Justice Wilson held that this was insufficient to determine whether the proposed expert had the requisite expertise to provide the opinion. He held that there is a second part to the inquiry, where the court must define the very topic on which the proposed witness will provide an opinion. The court found that the expert was not appropriately qualified.

Questioning an expert's qualifications is an opportunity to put the expert's evidence into context, show that your experts are more qualified and place the foundation for establishing or affirming pieces of your case through the expert.

Attacking an expert's qualifications requires that you carefully review with the expert their training, publications, research, and experience in that particular area in which they offer an opinion. This will expose the scope and depth of their expertise. For example, an orthopedic surgeon may only rarely treat persons with chronic soft tissue injuries and a neurologist may rarely assess certain types of brain trauma like concussion. In other words, the particular area of medicine may be within their general expertise but they may not actually be particularly well qualified to provide opinions on the specific area *that matters to your case*.

## **2. Proving or Enhancing Your Case Through an Opposing Expert Witness**

Where the expert is properly and justifiably qualified to offer opinion relevant to the case, there is an opportunity to try and use the expert's grand qualifications against them. This can sometimes be achieved by using authoritative literature and hypothetical questions to prove elements of your case through the expert witness. The goal is to use the opposing expert for your own purposes and have them adopt opinions favourable to your theory of the case. This is accomplished in cross-examination by attacking the expert with authoritative literature, challenging the expert with hypotheticals, and bolstering the credibility of the plaintiff.

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<sup>35</sup> 2012 BCSC 593.

<sup>36</sup> 2011 BCSC 1159.

<sup>37</sup> *Ibid.* at para. 8.

## **Authoritative Literature**

In cross-examination, the expert may be questioned on any text or publication which they acknowledge as authoritative. The cross-examiner reads extracts from the authoritative literature to test the opinion of the expert. If the expert agrees with the opinion in the extract, then it forms part of the evidence and strengthens your case. If the expert disagrees with the opinion in the authoritative literature, then the expert's credibility may be compromised. The law is well established on the appropriate use of authoritative literature. In *R. v. Marquard*, McLachlin J. (as she then was), stated for the Court:

The proper procedure to be followed in examining an expert witness on other expert opinions found in papers or books is to ask the witness if she knows the work. If the answer is "no", or if the witness denies the work's authority, that is the end of the matter. Counsel cannot read from the work, since that would be to introduce it as evidence. If the answer is "yes", and the witness acknowledges the work's authority, then the witness has confirmed it by the witness's own testimony. Parts of it may be read to the witness, and to the extent they are confirmed, they become evidence in the case.<sup>38</sup>

Justice Drost reiterated this test in *Privest Ltd. v. The Foundation Co. of Canada*, and discussed the correct technique for the use of learned treatises.<sup>39</sup> He cautioned against an attempt to use authorities in their entirety, as this would constitute hearsay evidence. He stressed the need for the expert to accept the authority before it would be accepted into evidence:

...[N]o textual finding or opinion offered in chief or cross-examination will be taken as substantive evidence unless an expert witness has accepted it and, in doing, adopted it as his own.<sup>40</sup>

Justice Drost also refers to the usefulness of authorities as a method for challenging an expert's credibility. This is discussed further in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*:

Learned treatises may be used in a similar way in cross-examination of the expert to confront him with an authoritative opinion which contradicts the view expressed by the witness on the stand...

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By cross-examining, the treatise is not used for the hearsay purpose of proving the truth of the opinion contained therein, but as a means of testing the value of the expert witness' conclusion. It does not become positive evidence unless confirmed by the witness. If the expert does not confirm the part, as in the case of the cross-examination on a prior inconsistent statement, it is utilized to challenge the expert's credibility; to test whether the witness has intelligently and competently read and applied what has been authoritatively written on the subject. If the witness adopts a passage in the text, it is the expert's and not the text writer's opinion that is the evidence.<sup>41</sup>

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<sup>38</sup> [1993] 4 S.C.R. 223, S.C.J. No. 119 at para. 56 (Q.L.).

<sup>39</sup> [1995] 128 D.L.R. (4th) 577, B.C.J. No. 2001 (S.C.) at paras. 290-311.

<sup>40</sup> *Ibid.* at para. 310.

<sup>41</sup> Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Markham, Ont.: LexisNexis, 2009) at §12.202, §12.204.

There are instances where counsel will be unable to shake the expert from their position by using authoritative literature. The expert may refuse to acknowledge the authority or refute the extract by citing other authoritative literature. Where the expert refuses to acknowledge the authority of the literature, and the literature is from a source that is commonly regarded as authoritative in the field, counsel can still challenge the expert with excerpts from this literature. This is a really a no-win situation for the expert as the contrary opinion from the authoritative literature minimizes the expert's credibility and their testimony.

### ***Enhancing Your Case through an Opposing Expert by Hypothetical***

Another approach to an expert who refuses to acknowledge the authority of the literature pertinent to your claim is to prove the case through the expert by using hypotheticals.

The use of hypotheticals can be a great tool for cross-examining an expert. The approach involves asking the expert questions based on hypothetical scenarios, giving counsel control over the relevant facts upon which the expert is questioned, the options available to the expert, and how the hypothetical facts and expert opinion relate to your theory of the case.

The goal is to encourage/force the expert to adopt your experts' opinions and your theory of the case indirectly by agreeing with hypothetical propositions that you have or will establish in your case. For example, in a chronic pain case with no objective signs of ongoing injury, you would use hypothetical questions that require the defence expert orthopedic surgeon to admit, for instance:

- Because pain is subjective it affects individuals differently;
- But the subjectivity of pain does not make it less real to the person in pain;
- Pain alone without obvious ongoing injury can be debilitating to the point of incapacity from work/recreation, etc.;
- The physiological basis of chronic pain is not well understood;
- The longer a person suffers chronic pain the less likely it is that the injury will resolve.

This tool is only effective if you can prove the facts that support translating the hypothetical into your case. The hypotheticals used to corner the expert are of no assistance to the court if they cannot be brought to bear in the case you are presenting.

### **Minimizing the Impact of the Opposing Expert's Testimony on your Client's Case**

In some cases, you will not be able to prove your case through the opposing expert in cross-examination. Where you cannot impeach the expert or prove your case through the authoritative literature or hypotheticals, you may still reduce the impact of the expert's testimony. Demonstrating the opposing expert to be an outlier from the rest of the expert evidence in the case can greatly assist an argument that little or no weight should be put on that opinion.

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The impact of an expert's testimony can be minimized in cross-examination by questioning the facts and information upon which the expert opinion is based and by challenging the expert's objectivity. Often these go together. Demonstrating that an expert did not have all of the information pertinent to deriving a balanced opinion can be an effective means of limiting the weight the opinion can hold. This requires a detailed and thorough review of the expert's file, notes and documents and the records that were relied upon by the expert. Review of the tests used and the people that the expert spoke with to fill in gaps in the written record is critical to an attempt to show that the expert was missing an important piece of the puzzle.

The second approach to reducing the impact of an expert's testimony is to show that the expert analyzed the information provided to them from a particular viewpoint and was not open minded to other notions. This can show that, in essence, the opinion is not fair and balanced. Failure to consider relevant information or basing an opinion upon unsupportable, unproven assumptions can destroy an expert's objectivity and credibility before the court. Further evidence of an expert's failure to be objective can be inferred from the fact that an expert is routinely hired by defence counsel or by looking at prior inconsistent statements given in expert testimony at other trials or in seminars and papers. A review of some of the law on experts appearing as advocates is set out earlier.

Another way to minimize the effect of an expert's testimony is to undermine the opinion on the basis of the (usually) very limited contact the expert has with the client. In most cases the defence expert will only meet with the plaintiff once and often will overlook opportunities to speak with collateral witnesses, such as the plaintiff's employer, spouse, and friends. This limited contact with the plaintiff should be contrasted with that of your experts. When there is a conflict of medical opinions, the physician who has had the benefit of greater information through continued care of the patient is, arguably, more likely to be accurate in their diagnosis. Experts often come to court prepared to give evidence only on what they believe is important, and many are only concerned with the evidence that supports their own opinions. The defense expert's narrow focus may present opportunities to use the defense expert as your guide to win.

These techniques were used in *Wilson v. Manzano* to discredit the opinion of Dr. Paul Bishop.<sup>42</sup> Justice Bernard held that Dr. Bishop's opinion was less compelling than the plaintiff's experts, he had only a "passing acquaintance"<sup>43</sup> with the plaintiff, he blamed the plaintiff's condition on factors that had not been established in the case, and his opinion was dismissive of the plaintiff's complaints.

In *Chabot v. Chaube*, Brown J. accepted the opinion of the plaintiff's experts over the opinion of Dr. Jordan Leith.<sup>44</sup> Cross-examination revealed that Dr. Leith had not reviewed all of the available reports when he wrote his opinion. Justice Brown noted that Dr. Leith agreed with the medical literature put to him on cross-examination that supported the plaintiff's expert's opinions. Dr. Leith was found to be

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<sup>42</sup> 2009 BCSC 1419.

<sup>43</sup> *Ibid.* at para. 41.

<sup>44</sup> *Supra* note 33.

evasive in cross-examination, and the result was that the court accepted the plaintiff's experts, whose "opinions accorded with one another's and with the evidence as a whole."<sup>45</sup>

A successful cross-examination of an expert witness requires a number of steps. It is important to critically analyse the expert's area of expertise and ensure that he or she is, in fact, qualified to opine in the area in which their opinion is being tendered. Familiarity with authoritative literature can lead to the introduction of supportive evidence, as well as undermine the opposing expert's credibility. Hypotheticals can also be used to have an expert bolster your theory of the case. Finally, attacking the expert as an advocate based on knowledge of that expert's previous opinions and areas of qualification, a thorough review of the expert's file and an analysis of recent case law to argue that the expert is an advocate are tools that can result in the court placing little weight on the expert's opinion.

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<sup>45</sup> See *ibid.* at paras. 178-201.