



**THE MEDICAL EXPERT WITNESS  
EDUCATE NEVER ADVOCATE**

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Expert evidence can be a valuable tool to assist the judge or jury to reach a conclusion in an area requiring specialized training and knowledge. But the search for truth can be easily distorted by the expert who fails in his duty to the court to provide opinions that are objective and intellectually honest. The opinion of the expert should never be influenced by which party retains him. Experts that become advocates not only fail in their duty to the court, but risk tarnishing their professional reputations when they become the subject of negative comments by the judge. Remember that the expert who educates rather than advocates will “gratify some judges and astonish the rest”.....19

## THE MEDICAL EXPERT WITNESS EDUCATE NEVER ADVOCATE

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“The best test of whether an expert is impartial is whether his or her opinion would not change regardless of which party retains him or her”.<sup>1</sup>

### I. Introduction

The duty of every expert is to give fair, objective, and impartial evidence. When the expert takes the stand to testify, the first thing the judge wants to know is “Can I trust this expert?” To paraphrase Mark Twain, “A medical expert who provides intellectually honest and unbiased evidence will gratify some judges and astonish the rest”. A judge will trust the expert who educates, not the expert who advocates.

### II. What is an expert?

An expert is a person with specialized knowledge and experience on a certain subject. This knowledge and experience qualifies the expert to provide the judge or jury with an unbiased and objective opinion regarding that subject.

### III. Why does the legal system need experts?

Experts provide “a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate”.<sup>2</sup> To be admissible, the expert’s opinion must satisfy the following criteria:

1. The subject-matter of the expert’s inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by the expert; and
2. The expert offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.<sup>3</sup>

If the judge or jury can form their own conclusions without the help of the expert, the opinion of the expert is unnecessary.<sup>4</sup>

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<sup>1</sup> P. Mitchell & R. Mandhane, “The Uncertain Duty of the Expert Witness” (2005) 42 Alta. L. Rev. 635 at para. 7. Cited in *White v Burgess Langille Inman v. Abbott and Haliburton*, [2015] 2 SCR 182.

<sup>2</sup> *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42.

<sup>3</sup> *Kelliher v. Smith*, [1931] S.C.R. 672 at 684.

<sup>4</sup> S.N Lederman, A.W. Bryant, & M.K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Toronto: LexisNexis, 2009) at 786.

#### IV. Admissibility of expert evidence

The courts have expressed concern that expert evidence intended to assist the trier of fact can easily distort the fact finding process. The Supreme Court of Canada in *R v. Mohan* expressed concern about the misuse of expert evidence:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.<sup>5</sup>

More recently, in *White Burgess Langille Inman v. Abbott and Haliburton*<sup>6</sup> the Supreme Court of Canada reconfirmed the dangers inherent in expert evidence. Cromwell J. refers to the fact that experts are difficult to cross-examine, as lawyers are not experts in the field; the risk that experts may rely on material or information not subject to cross-examination; the risk of “junk science” masquerading as expert evidence; the risk that the judge or jury will become distracted by a “contest of experts” resulting in an “inordinate expenditure of time and money”. To address these concerns, the Supreme Court of Canada restated the legal framework addressed in *Mohan* regarding the admissibility of expert evidence. This framework includes four threshold requirements, plus a residual discretion to exclude evidence based on a “cost-benefit analysis”.<sup>7</sup>

To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect – a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

The threshold standard is not onerous, and “it will likely be quite rare that a proposed expert’s evidence would be ruled inadmissible for failing to meet it”.<sup>8</sup> The requirement is merely that the expert is aware of his or her primary duty to the court and able and willing to carry it out. In *White*, the Court held an expert’s attestation or testimony that recognizes and accepts the duty will generally be sufficient to meet that threshold. Once met, the burden is on the party opposing admission to show a realistic concern that the expert is unwilling or unable to comply with the duty, at

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<sup>5</sup> *R. v. Mohan*, [1994] 2 SCR 9 at p. 21.

<sup>6</sup> *White v Burgess Langille Inman v. Abbott and Haliburton*, [2015] 2 SCR 182 at para 18.

<sup>7</sup> *Ibid* at para 19.

<sup>8</sup> *Ibid* at para 49.

which point the burden to establish admissibility rests with the proponent of the evidence.

The Supreme Court of Canada held that concerns about an expert's independence or impartiality should initially be addressed under the "qualified expert" element of the *Mohan* criteria. The Court held that an expert witness who is unable or unwilling to fulfill his or her duty of independence and impartiality is not "properly qualified to perform the role of an expert."<sup>9</sup> The Court further held that even when this threshold is met, concerns about a proposed expert's independence or impartiality must still be considered at the judicial discretion stage.

The Court in *White* provided examples of the types of interests and relationships that may warrant exclusion of the expert's evidence on the basis of lack of independence or impartiality include:

- The expert has a direct financial interest in the outcome of the litigation;
- The expert has a very close familial relationship with one of the parties;
- The expert will probably incur professional liability if his or her opinion is not accepted by the court; or
- The expert in his or her proposed evidence or otherwise, assumes the role of an advocate for a party.

Cromwell J. described the process as follows:

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.

...

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.

...

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.<sup>10</sup>

*White* provides a clear framework for determining the admissibility of expert evidence. Once the expert evidence crosses the threshold of relevance, reliability, necessity, and the absence of bias, the Court will exercise its discretion utilizing a

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<sup>9</sup> *Ibid* at para 53.

<sup>10</sup> *Ibid* at para 45, 49, 54.

cost-benefit analysis to decide whether the probative value of the evidence outweighs its prejudicial value.

## V. What should an expert do?

### A. Role of the expert

Judges have created a number of guidelines which experts should follow when forming and drafting their opinions:

- Expert evidence must be the independent product of the expert uninfluenced by the exigencies of litigation.
- Experts must provide independent assistance to the court with an objective unbiased opinion.
- An expert's opinion should not go beyond his or her expertise and should make it clear when a particular question or issue falls outside the expert's expertise.
- An expert must state the facts and assumptions on which the opinion is based.
- An expert must not omit to consider material facts and assumptions which may detract from his or her opinion.
- If an expert needs more information on which to make a proper opinion, this must be stated, and that the opinion given is a provisional one.
- An expert should never assume the role of advocate.<sup>11</sup>

#### i) Communication with counsel

The role of an expert is to provide non-partisan evidence. As such, experts need to ensure they remain impartial throughout the litigation process, including any communication with counsel while preparing the expert report.

In British Columbia, counsel's practice of providing experts with feedback on the form of an expert report is encouraged and there does not appear to be any requirement that counsel retain records of their involvement. In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)* the Court stated:

The Province suggests that if counsel choose to assist experts with their reports, they should be required to retain records to demonstrate the extent of their involvement. In my view, such a requirement risks creating an undue financial burden for litigants. While it may be wise in some situations to retain such records, as I see it, the law does not require counsel or experts to maintain such records in case they might be called upon to dispel allegations of bias at some point in the future. Nor should

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<sup>11</sup> See *Perricone v. Baldassarra*, [1994] O.J. No. 2199 (Gen. Div.) at para. 21, where the Court cited the UK House of Lords decision, *Ikarian Reefer*, [1993] 2 Lloyd's Rep. 68.

it raise a suspicion of improper involvement if counsel do not retain such records.<sup>12</sup>

In British Columbia, experts have an obligation to disclose their file on request. The expert's file includes all draft reports, notes and documents in the possession of the expert that they used in formulating their opinion.<sup>13</sup> Under the *Supreme Court Civil Rules* this disclosure must be made at least 14 days prior to trial.<sup>14</sup>

In other jurisdictions, the recent Ontario Court of Appeal decision of *Moore v. Getahun* held communication between an expert and counsel on an expert's draft report is permissible, so far as it does not impair the independence and objectivity of the expert.<sup>15</sup> Mr. Justice Sharpe commented:

I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.<sup>16</sup>

The Ontario Court of Appeal was of the view that communications about drafts are presumptively privileged and not subject to disclosure. In *Moore*, the Court also held it is not necessary to disclose all drafts of the report, notes, or discussions between counsel and experts, even where the expert will be called at trial. These items fall under litigation privilege, subject to the requirement to produce the "foundation of the expert's report" which is limited to material formulating the basis of the expert's opinion.<sup>17</sup>

The court can order disclosure of discussions if the party seeking production of materials can show reasonable grounds that counsel communicated with the expert in a manner that would likely interfere with the expert's duty of independence and objectivity. Justice Sharpe explained:

[71] Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would

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<sup>12</sup> *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Minister of Education)* 2014 BCSC 851 at para 54.

<sup>13</sup> Privilege is waived over reports and documents in possession of the expert as a result of the decision to tender the expert's report and opinions into court: G.R. Anderson, *Expert Evidence*, 2d ed. (Markham: LexisNexis, 2009) at 281.

<sup>14</sup> *Supreme Court Civil Rules*, R. 11-6(8).

<sup>15</sup> *Moore v. Getahun*, 2015 ONCA 55 at para 66

<sup>16</sup> *Ibid* at para 62.

<sup>17</sup> *Ibid* at para 75.

instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.<sup>18</sup>

[77] In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions.<sup>19</sup>

While both British Columbia and Ontario allow for communication between counsel and expert witnesses, the British Columbia rules regarding privilege of draft expert reports and notes contrast with those from Ontario.

#### ii) Never become an advocate

Doctors are advocates for the best health of their patients. But in court, doctors testifying as experts must provide an objective and unbiased opinion about the patient's condition. The expert who becomes an advocate in litigation risks having his or her opinion disregarded on the basis that the opinion is biased towards one party. This can affect not only the credibility, but the reputation of the expert. Mr. Justice Henderson discussed the difference between advocating for your opinion versus advocating for a party:

In attempting to put forward their views as clearly and positively as they can, the experts will, in a sense, argue with each other. Insofar as an expert is arguing for the correctness of his views and the incorrectness of opposing views within the realm of expertise, then argument is unobjectionable.

What the courts have taken frequent objection to is argument by experts on matters which fall outside the scope of their expertise. These are experts who portray a lack of objectivity by showing an inappropriate eagerness to assist the party who hired them.<sup>20</sup>

Expert witnesses who are not independent may still provide expert evidence. When looking at an expert's interest or relationship with a party, the question is "whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective

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<sup>18</sup> *Ibid* at para 70,71.

<sup>19</sup> *Ibid* at para 77.

<sup>20</sup> *Bolton v. Vancouver (City)*, 2002 BCSC 537 at para. 9

assistance”.<sup>21</sup> If experts are unable to satisfy their duty to the court then their expert evidence will be inadmissible.<sup>22</sup>

## **B. The opinion of the expert**

### **i) Contents of the expert report**

It is recommended that the expert report include the following headings:

- Statement of Qualifications
- Facts and Assumptions
- Opinion
- Appendix A: Findings on Clinical Assessment
  - Medical History
  - Examination
  - Collateral Information
- Appendix B: List of Documents Reviewed
- Appendix C: Information in Records Reviewed
- Appendix D: Instructions including the retainer letter

Jurors and Judges lose patience with long and verbose reports. Why not include an executive summary of the opinion in one or two paragraphs, setting out the cause of the injury, the present condition of the patient, and the prognosis for recovery. It is not necessary to critique another expert’s opinion in a report unless specifically requested in the retainer letter. Experts must be wary of only relying on the facts that support their opinion. If there are facts and information that can support an alternate opinion, they should be included in the report to show that they were considered. Experts may not make conclusive findings of facts on disputed issues, but they may state facts as the hypothesis on which they reach an opinion, or they can refer to matters which have already been put in evidence.<sup>23</sup>

Mr. Justice Abrioux said this when faced with a lengthy overly prolix medical report:

[21] Before applying the legal principles to the reports at issue in this hearing, I note that there is considerable diversity in the form of the various expert reports. Some are relatively brief and contain an introduction, a summary of facts and assumptions, and the opinion itself. They also contain, in conformity with Rule 11-6(1), the instructions provided by counsel, as well as an index setting out all the documents and other materials which have been reviewed by the expert.

[22] Other reports, however, adopt an entirely different approach. They contain lengthy appendices and schedules, including detailed summaries of various interviews which were conducted. In some instances, they also contain voluminous summaries of or comments on the documents and reports which the expert has reviewed. With respect to these latter reports, it will be difficult, and at times impossible, for the

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<sup>21</sup> *Supra* note 7 at para 50.

<sup>22</sup> *Ibid* at para 10.

<sup>23</sup> *Henry v. H.M.T.Q.*, 2015 BCSC 1799 at para 27.

trier of fact to differentiate between the assumed facts and the expert's opinion. The process is further complicated when the report contains argument under the guise of opinion, or opinion beyond the expertise of the expert.<sup>24</sup>

[23] This issue was considered by Mr. Justice G.C. Weatherill in *Thibeault v. MacGregor*, 2013 BCSC 808 (CanLII). In that case, the defendant sought to admit into evidence a lengthy medical-legal report of ... a physiatrist. It was 101 pages long and contained five appendices. Appendix "A" was a 22 page, single-spaced history obtained from the plaintiff. Appendix "B" consisted of a 5 page, single-spaced summary of approximately 90 documents that were reviewed by the expert. The "facts and assumptions" portion of the report was contained in Appendix "C". This was 24 pages long, single-spaced.

[24] In discussing the admissibility of the report, G.C. Weatherill J. stated:

[95] Counsel provided detailed written submissions on the issue of the ...Report's admissibility. I agree generally with the submissions of plaintiff's counsel... [The] report is prolix in the extreme. [His] review of the plaintiff's background was beyond thorough and comprehensive - it reported the minutia of the plaintiff's social, family, psychological and medical history. He opines on matters that have no relevance to the plaintiff's claim in this proceeding: He overreaches into the areas reserved for the trier of fact. He makes remarks that go solely to the plaintiff's credibility. His report in many places is argument in the guise of opinion. Much of the report purports to be opinion when what is written is not an opinion at all but rather a regurgitation of the plaintiff's complaints.

It is easy to identify with Mr. Justice Weatherill's frustration in having to read through the physiatrist's report. Mr. Justice Abrioux's similar frustration echoes concerns expressed by many of his fellow judges over the failure of medical experts to provide clarity and objectivity in the preparation of their reports. Experts opine on matters that have no relevance to the matters in issue in the plaintiff's claim. They often express their own views in areas that are reserved for the trier of fact, including opinions on the credibility of the plaintiff. The expert who insists on advocating rather than educating becomes irrelevant to the trier of fact. Just tell the trier of fact what they need to know and leave everything else for the appendices. The best way to achieve brevity and clarity is to include a one page summary or overview at the beginning of the report. Judges suggest that anything else not relevant or necessary for the opinion should be relegated to the appendices. Mr. Justice Abrioux in *Maras* says even the appendices should be "short and to the point":

1. An expert should keep any attached schedules or appendices short and to the point. Appendices "should be streamlined and only include what is necessary for the formulation of the expert's opinion and/or the facts and assumptions upon which it is based".

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<sup>24</sup> *Maras v. Seemore Entertainment Ltd.* 2014 BCSC 1109 at paras. 21-24.

2. Appendices should not include detailed summaries of interviews with the patient, or commentary on documents and reports which the expert reviews, unless there is a specific purpose for doing so, which specifically relates to the underlying facts and assumptions or the opinion itself.

3. Appendices containing summaries and comments with no opinion or underlying facts and assumptions does not need to be included in the report itself, but should be in the expert's file.

4. Information in an appendix that is a fact or assumption upon which an expert relies on should be included in the "facts and assumptions" section of the expert report.<sup>25</sup> If an appendix contains an opinion on which the expert relies on, then that should be set out in the "opinion" section of the expert report.

5. Experts may include a glossary of "scientific or technical terms" as an appendix to their report if it assists the trier of fact.<sup>26</sup>

6. To make expert evidence admissible, the scope of the instructions provided by counsel to an expert need to be disclosed.<sup>27</sup> A paraphrased summary of instructions is not sufficient. In order to meet this requirement, "all actual instructions received by the expert should be appended to the expert report that is to be tendered into evidence".<sup>28</sup>

7. The parties can also file an affidavit setting out instructions that were provided to the experts who have provided a report that is tendered into evidence.<sup>29</sup>

## ii) Causation and language

The "language used by experts can have a powerful impact on the quality of their evidence and on the evaluation of its reliability".<sup>30</sup> In cases where causation is at issue the use of "consistent with" is problematic, because it does not mean "caused". "Consistent with" provides an imprecise association that is unlikely to assist the judge or jury.<sup>31</sup>

The standard applied to prove causation differs in medicine and in law. Medical experts often apply a test of "medical certainty" that seems to approximate proof beyond a reasonable doubt. In civil cases the legal standard is not so stringent. The

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<sup>25</sup> *Ibid* at para 29.

<sup>26</sup> *Ibid* at para 92.

<sup>27</sup> *Supra*, note 25, Rule 11-6(1)(c).

<sup>28</sup> *Pinch v. Hofstee*, 2015 BCSC 1887 at para 3.

<sup>29</sup> *Ibid* at para 4.

<sup>30</sup> G.R. Anderson, *Expert Evidence*, 2d ed. (Markham: LexisNexis, 2009) at 355.

<sup>31</sup> *Ibid*.

law requires that causation be proven on a balance of probabilities.<sup>32</sup> Injuries that “probably” or “likely” resulted from the accident satisfy the standard, while injuries that “possibly” or “maybe” resulted from the accident do not. The clearest way to express probability is to state: “It is my opinion that the injuries to the plaintiff are a result of the accident and but for the accident they would not have occurred”.

Experts may want to employ specialized concepts and technical jargon to express their opinion, but the opinion must be logical, make progressive sense, and be comprehensible to the trier of fact.<sup>33</sup> If jargon is employed then definitions should be footnoted in the report along with an explanation of the medical term or procedure.

### iii) Authoritative literature

In the report, “the expert is permitted to refer to authoritative treatises and the like, and any portion of such texts upon which the witness relies is admissible into evidence”.<sup>34</sup> The expert may refer to any authoritative textbooks or papers cited in their report and use those authorities to help explain how their opinion was formulated. It is important to acknowledge any controversy in the literature and state what portions of the authority you are adopting as your opinion and why.

### iv) Changing an expert opinion

Experts must provide a supplementary report when their opinion changes in a material way.<sup>35</sup> It must be identified as supplementary, signed by the expert, include the necessary certification<sup>36</sup> and set out the changes in the opinion and the reason for it.<sup>37</sup> The supplementary report must comply with Rule 11-6(1) including the requirement to list all documents examined and the facts and assumptions relied on.<sup>38</sup>

## C. Pre-trial examination of the expert

Experts are generally not subject to pre-trial examination. The *Supreme Court Civil Rules* provide a specific exception in cases where an opposing party is unable to obtain the facts and opinion in the possession of that expert by other means.<sup>39</sup> The party

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<sup>32</sup> In addition, causation can be legally established in one of two ways: the “but for” test and the “material contribution” test: *Frazer v. Haukioja*, [2010] O.J. No. 1334 (Ont. C.A.), at para. 41. The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

<sup>33</sup> J.N. Iannuzzi, *Cross-Examination: The Mosaic Art*, (Toronto: Prentice-Hall, 1982) at 216.

<sup>34</sup> J. Sopinka, S.N Lederman, & A.W. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at 560.

<sup>35</sup> *Supra* note 20, R.11-6(6).

<sup>36</sup> *Ibid*, R. 11-2(2).

<sup>37</sup> *Ibid*, R. 11-6(7).

<sup>38</sup> *Amini v. Khania*, 2014 BCSC 697 at para 18.

<sup>39</sup> *Supra*, note 46, R. 7-5(2).

seeking to examine the expert must also show that the proposed expert witness refused or neglected upon request to give a responsive statement either orally or in writing.<sup>40</sup>

An application of this Rule might be appropriate in cases where an expert has had a “unique exposure to the facts or perhaps is the single reliable source of opinion available”.<sup>41</sup> The test under this rule is comparative prejudice; “the denial of access to an opinion of an expert who has unique knowledge as opposed to the infringement on privilege and the loss of confidence in respect of a professional relationship”.<sup>42</sup>

#### **D. Cross-examination of the expert**

Experts and their opinions are rarely destroyed by cross-examination. Instead the cross-examiner employs questions designed to establish the following:

1. The expert is limited in his or her education, qualifications, knowledge and experience;
2. The expert does not teach, conduct research, or publish and does not keep up with advances in the field through continuing education and conferences;
3. The opinion is founded on incomplete or inaccurate information provided to the expert by the lawyer or other sources;
4. The opinion is based on hypothetical assumptions that are incomplete or inadequate;
5. The expert has employed inappropriate or outdated methodology;
6. Prior statements, testimony, published papers, expert reports, or seminar presentations of the expert are inconsistent with the opinion presented at trial;
7. The expert harbors an intellectual bias or hidden motivation for testifying; and
8. The expert has not conducted a personal examination or assessment of the patient that may be contrary to ethical guidelines established by the expert's professional governing body.<sup>43</sup>

By raising concerns about the credibility of the expert or the expert's opinion the cross-examiner hopes to argue that little if any weight should be given to the expert's evidence. When these issues are raised on cross-examination, the expert should deal with them in a straightforward manner. For example, lawyers will tempt experts to opine outside their area of expertise. The expert should refuse the invitation and politely defer to another expert who is qualified to give an expert opinion on that

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<sup>40</sup> *Azuma Foods (Canada) Ltd. v. Versacold Canada Corp.*, 2008 BCSC 643 at para. 141; additional reasons at 1753, 2008 BCSC 792.

<sup>41</sup> *Kuzmanovic (Guardian ad litem of) v. Rojas* (1994) BCSC 3131 at para 11.

<sup>42</sup> *Ibid* at para 21.

<sup>43</sup> L.E. Schwartz, *Proof, Persuasion, and Cross-Examination: A Winning New Approach in the Courtroom*, (New Jersey: Executive Reports Corporation, 1978) at 2103.

issue. This will increase the confidence the judge has in the opinions of the expert within his area of expertise.

During cross-examination, experts may be questioned on any text, publication, or author acknowledged as authoritative in the field. Drost J. expressed it this way:

Does the witness recognize the authority of - as distinct from accepting the validity of - the particular writing, whether due to the status of the text or journal from which the writing is taken or due to his or her recognition of the status and authority of the author?

The use of authoritative literature in cross-examination is not to prove the truth of the treatise, unless adopted by the expert, but as a means of testing the credibility of the expert's opinion.<sup>44</sup> It is therefore immaterial that the expert does not agree with the published work, only that it is regarded in his field of expertise as an authoritative source. If the expert agrees with the reference from the authoritative source it becomes evidence in the trial.

In cross-examination, lawyers will typically provide the expert with a fresh set of facts and assumptions that support an opinion that is different to the one offered in the expert's report. The unbiased expert will provide an opinion based on only those new facts and assumptions, and will not let any other factors affect his or her opinion. The judge and jury will understand that the new opinion is based on facts and assumptions that may not be true. Let the lawyer be the advocate.

## **VI. Lessons for the expert?**

Below are some lessons to help experts avoid being viewed as an advocate for one party. The following examples are from actual cases and are included to show how judges have criticized experts who cross the line.

### **A. Admit when another diagnosis is possible**

#### **Case 1**

Dr. A would not admit to the possibility of any other diagnosis ... despite being shown credible evidence contrary to his diagnosis ...

Throughout the cross-examination of Dr. A, he was argumentative and refused to consider material facts which might detract from his opinion. This is not the proper role of an expert, who must provide an unbiased opinion and consider material facts which are put to him or her: *Perricone v. Baldassarra* (1994), 7 M.V.R. (3d) 91, [1994] O.J. No. 2199 (Gen. Div.). I am satisfied that Dr. A was an advocate for the defence and his opinion should be given very little weight.

### **B. Never provide an opinion based on incomplete information**

#### **Case 2**

Counsel for the Plaintiff submits that Dr. B, though qualified as an expert to give opinion evidence, crossed the line and became an advocate in the

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<sup>44</sup> *Privest Properties Ltd. v. Foundation Co. of Canada*, [1995] 128 DLR (4th) 577 at page 295-6. See also *Supra* note 10 at 660-661.

Defendants' cause; he reached a conclusion that was patently unreasonable, given his own evidence.

Dr. B testified that the back problems that the Plaintiff suffers from today probably arise from his work injuries. Yet he readily conceded that he had no information regarding the Plaintiff's back condition just prior to the injuries at work or its condition after he returned to work ... he had no information about the nature of the work at the time of those injuries, other than the very cryptic description on the W.C.B. Report form.

In my view, counsel's criticism of Dr. B's evidence is well merited and I can give little weight to it.

### Case 3

I find it most unusual that Dr. C did not avail himself of clinical records and opinions concerning the condition of the plaintiff in the period between the accident and his examinations. In addition he was unaware of certain facts that would have had a bearing on the opinion he rendered. He conceded this in cross-examination when he heard for the first time that the plaintiff had carried out substantial overtime during the year following the accident and thereafter. I would have expected that an opinion on causation with respect to an injury sustained over four years earlier would have required consideration of evidence other than x-rays and the subjective complaints of the plaintiff. Surely the clinical records in the one or two years following the accident would be of assistance to Dr. C. The medical legal reports during the first two years indicated the plaintiff had suffered a mild injury. In addition there was some evidence indicating he had lumbar problems that had prevented him from working before and after the accident. Dr. C must have been aware that his opinion was being sought to support a claim in court that would assist the plaintiff in recovering damages arising out of the motor vehicle accident.

The video of the examination of Dr. C demonstrated to me that he was responding more as an advocate than a scientist. He reached unnecessarily for opportunities to support the plaintiff's cause.

### Case 4

In my view the evidence of Dr. D should be given limited weight. He is no doubt a well-qualified orthopaedic surgeon. However, his opinion with respect to causation is based to a large extent on incorrect and incomplete information. His factual conclusions are, for the most part, inconsistent with the findings of fact made by the Court ...

As I see it, Dr. D acted as an advocate for the defendants, not an expert whose sole purpose is to assist the Court. He highlighted all matters that would support the defence position and either downplayed or ignored those that would support the position of Mr. P.

### C. Balance your practice

#### Case 5

Dr. L received 91% of his income for 2013 from ICBC. In 2012, it was 87%, in 2011, 78% and in 2010, the year of the accident, 60%. Plaintiff's counsel therefore argued that Dr. L's report was not in keeping with the *Supreme Court Civil Rules*, in that it was biased and so not a neutral opinion rendered by an expert for the benefit of the Court.

While I have accepted that Dr. L is an expert, I find that his report is to be afforded very little weight given his testimony at trial, and given the extent to which his report strayed into advocacy. It is difficult to ignore the percentage of yearly income gained by the doctor as an expert for one particular party, ICBC, although this alone is not determinative in my finding that Dr. L's report should be afforded little weight.

I note that the doctor was argumentative with counsel. The Court was often required to direct him to answer, as he would not clearly give his evidence in response to simple questions asked. On cross-examination, he agreed he was not a practicing physical medicine doctor and that he did not assess the plaintiff's physical injuries, and would defer instead to the plaintiff's physical medicine doctors, and yet he commented that the plaintiff's pain and limitations were inconsistent with her stated injuries.

### D. Consider all material facts and if your opinion changes explain why

#### Case 6

Dr. F has in my opinion crafted his evidence to fit the plaintiff's claim. That is the only conclusion that can be arrived at by his complete change in the diagnosis and prognosis of this plaintiff's problems. His initial opinion was that there was "no likelihood of permanent disability arising at a later date as a result of the said accident". He now says "this situation has been progressive ever since the date of the accident and there is no possibility of any resolution of her problem in the future". He completely attributes her current disability to the motor vehicle accident in 1978 and refers to her industrial accident as a "minor aggravating factor". That is inconsistent and nonsense in itself, particularly when she was off work for a longer period of time following the industrial accident than for the motor vehicle accident. Dr. F's evidence is totally unreliable, untrustworthy and unacceptable.

### E. Never opine outside your area of expertise

The expert must be aware of the limits of his or her expertise, stay within them, and not exaggerate them to the court.<sup>45</sup>

#### Case 7

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<sup>45</sup> Hon. Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Ottawa: Queen's Printer for Ontario, 2008) at 14.

It is regrettable but, in light of previous judicial comment, I feel it necessary to comment regarding the propriety of counsel representing defendants in cases such as the one at bar (who are in my understanding effectively ICBC) tendering evidence such as that given by Mr. G. In the following cases Mr. G has been called as an expert witness:

... In each of those cases the Court has commented that his opinion outreached his expertise. After so many instances of negative judicial comment, over so many years, for ICBC to continue to tender Mr. G's incomplete and too far-reaching opinions is, in my view, utterly inappropriate.

#### **F. Never be argumentative**

##### **Case 8**

While I found Dr. H to be a very knowledgeable witness, during his testimony, particularly during cross-examination, he had difficulty maintaining the appearance of impartiality and independence, and instead appeared to adopt the role of advocate or partisan on the plaintiff's behalf. He was prepared to express opinions that went beyond the areas he was specifically asked to address, and sometimes diverged into areas in which his qualifications as an expert could not be said to extend. He was argumentative with counsel, and unduly defensive in response to a pointed, but polite cross-examination. For that reason, while I do place weight on the results of the testing administered by Dr. H, I find his opinions based on more subjective considerations to be entitled to little or no weight.

#### **G. Never comment on the credibility of the plaintiff**

As experts, doctors should not comment on the credibility of the patient. The Waddell Signs are a good example of where this can happen.<sup>46</sup> The Waddell Signs are occasionally used by expert doctors as a means to justify opining on the credibility of the patient. They should not be used for this purpose and there is medical literature to support the position that positive Waddell Signs do not signify malingering.<sup>47</sup> It is appropriate to comment on the results of the Waddell Signs but credibility is for the judge and jury to determine. By commenting on the credibility of the patient, the expert assumes the role of advocate which undermines his or her credibility with the trier of fact.

##### **Case 9**

After hearing Dr. L's evidence at trial and having the opportunity to consider the totality of his evidence, including both written opinions and

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<sup>46</sup> Named after G. Waddell from his article co-authored by J.A. McCulloch, E. Kummel & R.M. Venner "Nonorganic physical signs in low back pain" (1980) 5 *Spine* 117; The Waddell Signs can be used to detect whether or not there is a non-organic cause of a patient's pain.

<sup>47</sup> D.Fishbain et al., "A Structured Evidence-Based Review on the Meaning of Nonorganic Physical Signs: Waddell Signs" (2003) 4 *Pain Medicine* 141; D. Fishbain, R. B. Cutler, H. L. Rosomoff, & R. Steele Rosomoff, "Is There a Relationship Between Nonorganic Physical Findings (Waddell Signs) and Secondary Gain/Malingering?" (2004) 20 *Clinical Journal of Pain* 399.

the entirety of his testimony at trial, I have concluded that Dr. L's opinion presents a distorted recording of his interview with the plaintiff by failing to identify with preciseness the questions which he asked of her and by his interspersed editorializing as to what answers he would have expected, all of which constituted his assessment of her lack of credibility which he then used as the basis for his diagnosis. That in turn resulted in a resort to advocacy on behalf of the defendant in relation to issues of causation and, in my view, demonstrated a personal investment in the litigation sufficient to constitute bias.

## VII. What do experts need to know about the Supreme Court Civil Rules

### A. Duty of the expert witness

The *Supreme Court Civil Rules* govern expert reports and the role of experts at trial. Rule 11-2(1) provides:

- (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.
- (2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she
  - (a) is aware of the duty referred to in subrule (1)
  - (b) has made the report in conformity with that duty, and
  - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

The common law has always required experts to be objective and to fulfill this duty to the court. This recent requirement in the Rules for experts to acknowledge their duty in writing was adopted in response to frustration by the courts with experts who continually ignored their duty in favor of what Henderson, J. refers to as “inappropriate eagerness to assist the party who hired them.”<sup>48</sup> While it is appropriate to advocate for an opinion it is inappropriate to advocate for a party. That is the role of the lawyer not the expert.

### B. Timelines

In British Columbia, the admissibility of expert evidence is governed by Rule 11-6. According to Rule 11-6(3), unless otherwise ordered by the court, the expert report must be served on all parties at least 84 days prior to the beginning of trial. Per Rule 11-6(4), a responding expert report must be served on all parties at least 42 days prior to trial. As well, Rule 11-6(5) provides if new information has come to light which alters the original opinion in a material way the expert must provide a supplemental report.

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<sup>48</sup> *Supra*, note 20.

## **VIII. Conclusion**

Expert evidence can be a valuable tool to assist the judge or jury to reach a conclusion in an area requiring specialized training and knowledge. But the search for truth can be easily distorted by the expert who fails in his duty to the court to provide opinions that are objective and intellectually honest. The opinion of the expert should never be influenced by which party retains him. Experts that become advocates not only fail in their duty to the court, but risk tarnishing their professional reputations when they become the subject of negative comments by the judge. Remember that the expert who educates rather than advocates will “gratify some judges and astonish the rest”.